APPENDIX

JUN 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

*Appellants,*

*v.*

PURSUE, LTD.

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

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JURISDICTIONAL STATEMENT FILED AUGUST 14, 1973
PROBABLE JURISDICTION NOTED MARCH 18, 1974

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# APPENDIX A

Opinion and Order of Judgment of the Three-Judge District Court (Celebrezze, Circuit Judge, and Young and Walinski, District Judges) filed in the United States District Court for the Northern District of Ohio, Western Division in Pursue Ltd. v. Lawrence S. Huffman et al., No. C 72-432 on Apr. 20, 1973..... Page 3-11

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., etc., Plaintiff, | Filed Apr. 20, 1973 |
| v. | No. C 72-432 |
| LAWRENCE S. HUFFMAN, etc., et al., Defendants. | OPINION AND ORDER |

Before: CELEBREZZE, Circuit Judge, and YOUNG and WALINSKI, District Judges.

CELEBREZZE, Circuit Judge:

This is a suit under 42 U.S.C. § 1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§ 3767.01, et seq., as it pertains to the exhibition of obscene movies.

On September 18, 1972, Defendant Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint in the Allen County Court of Common Pleas, seeking a temporary injunction pursuant to O.R.C. § 3767.04 and a permanent injunction pursuant to O.R.C. § 3767.06 closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of O.R.C. §§ 3767.01 and .02. The Common Pleas Court conducted a hearing on Defendants' motion

for a temporary injunction, at which the owners and William Dakota, then operator of the Theatre, were represented by counsel and four motion picture films subpoened by Defendant were reviewed. Finding that a nuisance existed on the premises, the Court on October 24, 1972, entered an order closing the theatre for an indefinite period, apparently pursuant to O.R.C. § 3767.04.

On October 25, 1972, William Dakota filed a complaint in this Court under case No. C 72-384, seeking a temporary restraining order against execution of the Common Pleas Court's judgment. By an Opinion and Order dated November 1, 1972, this Court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

The Common Pleas Court reconvened for the combined purpose of conducting a prior adversary hearing on films not yet reviewed and considering Defendants' application for a permanent injunction against the theatre. Photographs from 12 additional movies which had been shown at the theatre were reviewed. In a judgment entered November 30, 1972, the Court found in part as follows:

> "That defendant William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offen-

> sive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing."

Pursuant to O.R.C. § 3766.06, the theatre was therefore ordered closed "for any purpose for a period of one year unless sooner released by order of /the/ Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio."[1]

Plaintiff Pursue, Ltd., a Delaware corporation and assignee of William Dakota's

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1. Although the final judgment of the Common Pleas Court was in part directed against William Dakota, predecessor to Plaintiff in the leasehold interest in the theatre, we find no difficulty in recognizing Plaintiff's standing to bring the present suit. The ohio nuisance statute, O.R.C. § 3767.01, et seq., is primarily directed against property on which a nuisance is maintained. Accordingly, the Common Pleas Court's final judgment not only enjoined William Dakota and the other state defendants from conducting the nuisance, but also ordered the theatre itself closed. When the state court's judgment closing the theatre was entered, Plaintiff herein had clearly succeeded Dakota as leaseholder and operator of the theatre. We therefore find that Plaintiff clearly has standing to bring the present action, notwithstanding the fact that it was not a party to the state court proceedings.

leasehold interest in the theatre as of November 17, 1972, filed the present complaint in this Court seeking a temporary restraining order and preliminary and permanent injunctive relief against the above judgment of the Common Pleas Court and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. By an order entered December 1, 1972, a single judge of this Court stayed the judgment of the Common Pleas Court pending the convening of this three-judge Court, except insofar as that judgment applies to films which have been declared obscene in a prior adversary hearing.

The complaint lodges two general attacks upon the constitutionality of the Ohio nuisance statute, O.R.C. § 3767.01, et seq. In its first general challenge to the statute, Plaintiff contends that the definition of "nuisance" found in Section 3767.01 respecting "... any place, in or upon which lewd, indecent, lascivious, or obscene films ... are exhibited..." is overly broad and void for vagueness.

In Grove Press, Inc. v. Flask, 326 F. Supp. 574, 578 (N.D. Ohio 1968) (appeal No. 70-1 pending before the Supreme Court), a three-judge court reviewed and rejected a similar challenge against the language of Section 3767.01. There, relying on the Supreme Court's decision in Roth v. United States, 354 U.S. 476 (1957), the Court held that language of Section 3767.01 was not overly broad so as to constitute a denial of due process. In Grove Press the Court assumed that Ohio's courts and prosecutors would give effect to the United States Supreme Court's limitations respecting obscenity and noted that the Supreme Court of

Ohio had in fact done so in State v. Mazes, 7 Ohio St. 2d 136 (1966). Significantly, the above-quoted portion of the Common Pleas Court's final judgment in the present case reflects the standards set forth in A Book Named "John Clelland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966), further justifying the deference which we must grant to the state courts in applying the obscenity provisions of Section 3767.01.

Relying on the decision in Grove Press Inc. v. Flask, supra, 326 F. Supp. 578, we hold that the obscenity language of Section 3767.01 is not overly broad or void for vagueness.

As its second general attack upon the Ohio nuisance statute, Plaintiff contends that O.R.C. §§ 3767.04 and 3767.06 are unconstitutional in that they authorize a prior restraint on the exercise of First Amendment rights. Section 3767.06[2] provides in pertinent part that upon a deter-

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2. The relevant language of Section 3767.06 reads as follows:

"If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section

mination that a nuisance exists upon a given premises, a common pleas court shall order the premises closed "for any purpose" for a period of one year unless the owner obtains a release from such order by demonstrating that the nuisance has been abated and posting a bond conditioned on the nonrecurrence of the nuisance. Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this Section for a period of one year regardless of the nature of any other

2 - Continued:

3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code ...."

films which the owner or operator may have intended to show during that period, with the burden falling on the owner to come into court and prove the nonobscenity of any such other films.

Section 3767.04 provides that pending a final decision on an application for a permanent injunction, a common pleas court can order the closing of a given premises for certain purposes upon which a nuisance has been found to exist. To the extent that Section 3767.04 authorizes a court order closing a theatre without a prior adversary hearing on every film which is to be barred, the court will examine its constitutionality.

We agree with Plaintiff's argument that this provision under Section 3767.06 constitutes an overly broad prior restraint on its First Amendment rights.[3] We recognize that the Supreme Court's decisions in Near v. Minnesota, 283 U.S. 697 (1931), Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), and New York Times v. United States, 403 U.S. 713 (1971), did not deal with prior restraints respecting allegedly obscene materials. Nonetheless, in Marcus v. Search Warrant, 367 U.S. 717, 731 (1961), the Supreme Court noted that "a State is not free to adopt whatever procedures it pleases for dealing with ob-

3. That a corporation such as Plaintiff here has First Amendment rights appears to be well established. See New York Times v. United States, 403 U.S. 713 (1971); Bantam Books, 372 U.S. 58 (1963). Cf. Grosjean v. American Press Co.,Inc., 297 U.S. 233, 244 (1936).

scenity ... without regard to the possible consequences for constitutionality protected speech." See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

In Marcus v. Search Warrant, supra, the Court struck down a state procedure under which a single police officer, operating under a search warrant, was permitted to conduct a mass seizure of materials which he alone deemed to be obscene, in the absence of a prior adversary hearing. See also A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). Similarly, in Grove Press, Inc. v. Flask, 326 F.Supp. 574, 580-82 (N.D. Ohio 1970), the court declared unconstitutional a city ordinance which permitted the seizure of allegedly obscene materials without a prior adversary hearing. Significantly, in Grove Press the Court rejected a constitutional attack upon the penalty provisions of the Ohio nuisance statute since the statute did require a prior adversary hearing respecting the obscenity of the single film involved in that case. See 326 F. Supp. at 579-580.

Unlike the Grove Press case, the present suit does not challenge the Ohio nuisance statute as applied to a single motion picture which has been adjudged obscene in a prior adversary hearing. Rather, we are here faced with an injunction under that statute which bars the showing of any films and closes the theatre "for any purpose" for a period of one year. Although a prior adversary hearing was conducted with respect to some 16 films in the theatre's possession prior to the state court's final judgment, the stature provides for no such hearing on any

other films which the operator may have intended to show during the one-year period.

No less than the injunctive penalties imposed under the state nuisance statute in Near v. Minnesota, supra, the Common Pleas Court's order closing the theatre for one year constitutes an impermissible prior restraint in that no adequate safeguards -- in the form of prior adversary hearings -- are afforded for materials which might be nonobscene and thus protected by the First Amendment. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65-66 (1963). Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). The invalidity of this procedure is not removed by the fact that under the statute Plaintiff can obtain a release from the court's order by satisfying the court that the nuisance has been abated. Such a procedure which places upon the individual or corporation the burden of proving that matter which he intends to distribute or exhibit is protected by the First Amendment is "but a step /toward/ a complete system of censorship." Near v. Minnesota, supra, 283 U.S. at 721.

We conclude that the provision of O.R.C. § 3767.06 authorizing a state court to order the closing of a premises upon which a nuisance has been found to exist violates the Fourteenth Amendment when, as in the present case, that sanction precludes the showing of films which have not been found to be obscene in a prior adversary hearing and which thus might be protected by the First Amendment. We further conclude that the comparable provision in O.R.C. § 3767.04, authorizing a state court to close a premises pending a ruling on an

application for a permanent injunction is similarly unconstitutional to the extent that it precludes the showing of films which have not been determined to be obscene in a prior adversary hearing.

Defendants are therefore enjoined from executing that portion of the Allen County Common Pleas Court's judgment of November 30, 1972, which orders the closing of Plaintiff's theatre pursuant to O.R.C. § 3767.06. Having ruled upon the constitutionality of the state statutes, this three judge court is dissolved and the case is remanded to Judge Nicholas J. Walinski for further proceedings under Plaintiff's claim for damages as set forth in the amended complaint.

(Sd) ANTHONY J. CELEBREZZE
Anthony J. Celebrezze

(Sd) DON J. YOUNG
Don J. Young

(Sd) NICHOLAS J. WALINSKI
Nicholas J. Walinski

In conformity with Rule 77 (d) F.R. C.P. please take notice that the following order of judgment was entered in this court on APR 20 1973.

Dominic J. Cimino, Clerk

# APPENDIX B

Ohio Revised Code, Sections 3767.01 thru 3767.11


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**§ 3767.01 Definitions.**

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

**§ 3767.02 Nuisance.** (GC § 6212-2)

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

**§ 3767.03 Abatement of nuisance; bond.** (GC § 6212-3)

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the

same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

**§ 3767.04 Procedure in injunction action.** (GC § 6212-4)

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of

the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the

court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

**§ 3767.05 Priority of action; evidence; costs.** (GC § 6212-5)

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term

of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

**§ 3767.06 Content of judgment and order.** (GC § 6212-6)

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days

after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

**§ 3767.07 Court shall punish offender for violation of injunction or order.** (GC § 6212-8)

In case of the violation of any injunction or closing order, granted under sections 3767.01 to 3767.11, inclusive, of the Revised Code, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court or, in vacation, a judge thereof, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

**§ 3767.08 Tax when permanent injunction issues; payment.** (GC § 6212-9)

Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars. Such tax may not be imposed upon the personal property or against the owner thereof who has proved innocence as provided in section 3767.06 of the Revised Code, or upon the real property or against the owner thereof who shows to the satisfaction of the court or judge thereof at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return of the imposition of said tax thereon to the county auditor, who

shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected under section 2905.14 of the Revised Code.

**§ 3767.09 Tax shall be imposed against owner of property.** (GC § 6212-10)

When a nuisance is found to exist in any proceeding under sections 3767.01 to 3767.11, inclusive, of the Revised Code, and the owner or agent of such place whereon the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars, imposed under section 3767.08 of the Revised Code, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein, and existing laws, regarding the service of process, shall apply to service in proceedings under sections 3767.01 to 3767.11, inclusive, of the Revised Code. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any owner-

ship, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property affected by the action." Service thereon may be had by publication in the manner prescribed in sections 2703.14 to 2703.19, inclusive, of the Revised Code. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make defense thereto and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

**§ 3767.10 Lease void if building used for lewd purposes.** (GC § 6212-12)

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises.

**§ 3767.11 Procedure when nuisance established in criminal proceeding.** (GC § 6212-7)

In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall proceed promptly, under sections 3767.01 to 3767.11, inclusive, of the Revised Code, to enforce such sections, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under such sections shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 3767.06 of the Revised Code, shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 3767.07 to 3767.11, inclusive, of the Revised Code.

# APPENDIX C

State of Ohio, ex rel Lawrence B. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (a Civil Action in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theater as a public nuisance)

Papers included in Appendix: Page

Complaint, filed Sept. 18, 1972.....C3-14
Motion for Temporary Injunction, filed Sept. 18, 1972.....C15-17
Notice for Hearing, filed Sept. 18, 1972.....C18
Subpena Duces Tecum, filed Sept. 18, 1972.....C19-21

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel<br>LAWRENCE S. HUFFMAN<br>127-129 North Pierce Street<br>Lima, Ohio | : | |
| PLAINTIFF | : | |
| -vs- | : | CASE NO.<br>72 CIV 0326 |
| WILLIAM H. DAKOTA<br>2650 West Market Street<br>Lima, Ohio | : | |
| and | : | COMPLAINT |
| FLORA MAY COLLINS MOOR<br>104 South Dale Drive<br>Lima, Ohio | : | Filed Sept. 18, 1972 |
| and | : | |
| LELAND SAMUEL COLLINS<br>Address unknown | : | |
| and | : | |
| SARA LEE COLLINS<br>Address unknown | : | |
| and | : | |
| PUSSY cat corporation<br>#69 Public Square<br>Lima, Ohio | : | |
| or | : | |
| Los Angeles, California | : | |

and :

CINEMA I. THEATRE :
#69 Public Square
Lima, Ohio :

and :

JOHN DOE #1 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

JOHN DOE #2
c/o Cinema I :
#69 Public Square
Lima, Ohio :

and :

JOHN DOE #3 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

JOHN DOE #4
c/o Cinema I :
#69 Public Square
Lima, Ohio :

and :

JOHN DOE #5 :
c/o Cinema I
#69 Public Square :
Lima, Ohio

and :

JANE DOE #1
c/o Cinema I
#69 Public Square :
Lima, Ohio

:

and

:

JANE DOE #2
c/o Cinema I :
#69 Public Square
Lima, Ohio :

DEFENDANTS :

.. .. .. .. .. .. .. .. .. .. ..

Now comes Lawrence S. Huffman, plaintiff, and for his cause in equity to abate the motion picture theatre known as "Cinema I" as a public nuisance in Allen County, Ohio, states:

1. That he is the prosecuting attorney of Allen County, Ohio, and brings this action in equity in the name of the State of Ohio pursuent to Sections 3767.01, et seq., of the Ohio Revised Code;

2. That defendant, William H. Dakota, is the manager and person in control of the Cinema I Theatre, a motion picture theatre located at #69 Public Square, Lima, Allen County, Ohio;

3. That defendants Flora May Collins Moor, Leland Samuel Collins and Sara Lee Collins are the owners of the premises and building in which the Cinema I Theatre is operated and the legal description of said property is as follows:

Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot.

4. That the defendant, Pussy Cat Corporation is a corporation which operates a motion picture theatre called Cinema I located at #69 Public Square, Lima, Ohio.

5. That defendants, Jone Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1 and Jane Doe #2, whose names plaintiff cannot discover are employed at said Cinema I Theatre.

6. That the defendants, William H. Dakota, Flora May Collins Moor, Leland Samuel Collins, Sara Lee Collins, Pussy Cat Corporation, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1, and Jane Doe #2 are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre;

7. That for a period of ten weeks the Cinema I Theatre has consistently shown obscene motion picture films in the City of Lima, County of Allen, State of Ohio, contrary to the laws of the State of Ohio; that such use of the premises described above establishes said premises as a nuisance, and, as such, the same should be abated;

(a) That the showing on the play dates July 12 -- July 18, 1972, of the motion picture "Man and Wife" was a violation of the obscenity and nuisance laws of the State of Ohio;

(b) That the showing on the play dates July 19 -- July 23, 1972, of the motion pictures "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(c) That the showing on the play dates July 25 -- August 1, 1972, of the motion pictures "The Hangup" and "The Cut-throats" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(d) That the showing on the play dates August 2 -- August 8, 1972, of the motion pictures "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(e) That the showing on the play dates August 9 -- August 15, 1972, of the motion pictures

"Prostitution, Pornography, U.S.A." and "Oddly Coupled" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(f) That the showing on the play dates August 16 -- August 22, 1972, of the motion pictures "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(g) That the showing on the play dates August 23 -- August 29, 1972, of the motion pictures "Midnight Plowboy" and "Tobacco Roody" and the previews of coming attractions, was a violation of the obscenity and nuisance laws of the State of Ohio;

(h) That the showing on the play dates August 30 -- September 5, 1972, of the motion pictures, "The Blue Hour" and "The Grabbers" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(i) That the showing on the play dates September 6 -- September 12, 1972, of the motion pictures "Sweet Georgia" and

"The Exotic Dreams of Casanova" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(j) That the showing on the play dates September 13 -- September 18, 1972, of the motion pictures, "Marriage Manual" and "Love Under 17" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio.

That Appendices A--F and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7(d) through 7(i), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached to the copies of petitions to be served upon the defendants for the reason the costs of copies of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court.

8. (a) That on or about the 18th day of September, 1972, the defendant, Cinema I, caused a notice to be placed in the daily newspaper of Lima, Ohio, advertising the motion picture films "Marriage Manual" and "Love Under 17" at said Cinema I Theatre;

that the past and continuing exhibition of "Marriage Manual" and "Love Under 17" and the previews of coming attractions, and such other motion picture films as described herein at the Cinema I Theatre did and does constitute a nuisance under Section 3767.01(C) of the Ohio Revised Code in that (1) the dominant theme of said motion picture films, taken as a whole, appeals to a prurient interest in sex; and (2) that said motion picture films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters; and (3) said motion picture films are utterly without redeeming social value, which three elements coalesce.

9. That the exhibition of said motion picture films at Cinema I Theatre is a violation of Chapter 3767 and other sections of the Ohio Revised Code in that such exhibitions cause moral pollution of the community and will cause and result in immediate and irreparable harm and damage to the morals and welfare of the people of the State of Ohio.

10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as that term is defined in Section 3767.01(C) of the Ohio Revised Code, which reads in part as follows:

> "Section 3767.01 Definitions
>
> As used in all sections of the Revised Code relating to nuisances:
> (C) 'Nuisance' means that which is defined and declared by stat-

> utes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(d) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14, fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

11. That each and all of the foregoing acts and the conduct of the defendants in the use of said property for the use and purposes and in the manner aforesaid, interferes in the tranquility, peace and quiet, generally, of plaintiff and the nearby communities, constitutes unlawful, unwarranted, and unreasonable use of defendants' property to the extreme annoyance, disturbance, discomfort, and hurt of plaintiff, and is detrimental to the public good and to the common welfare; such lewd acts and conduct are offensive to public decency, morals, peace, and health, and constitute a public nuisance which is subject to abatement under Chapter 3767 of the Ohio Revised Code, and should be forthwith enjoined and abated; and that unless enjoined by the Court, the defendants, and each of them, by themselves, and through their agents or representatives, will exhibit the motion picture films "Marriage Manual" and "Love Under 17" and other similar films at the Cinema I Theatre and at other theatres near and in the close proximity to the community in which plaintiff resides, and elsewhere in the State of Ohio.

WHEREFORE, plaintiff prays:

1. That such nuisance be forthwith abated by order of the Court pursuant to the provisions set forth in Chapter 3767

of the Ohio Revised Code.

2. That pending a final determination of this action, the Court fix a time and place for the hearing of plaintiff's Motion for a Preliminary Injunction, (a) enjoining and restraining the defendants, pendente lite from maintaining such nuisance, and (b) requiring an accounting of the box office receipts arising out of the exhibition of the above named motion picture films; that at the time and place so fixed, the defendants be required to appear with the above named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box office receipts arising out of the exhibition of said motion picture films from the first exhibition thereof in the State of Ohio to and including the final performance after termination of the appeal in favor of the State of Ohio, and the same forfeited to the State of Ohio as contraband upon final determination of the appeal in favor of the State of Ohio.

3. That the defendants, and all of them, and all persons acting by, through, under or in concert with them be permanently enjoined and restrained from exhibiting said motion picture films in the State of Ohio.

4. That plaintiff have judgment for costs herein and for such other and further relief as the Court may deem proper.

(Jurat omitted in printing)

STATE OF OHIO

By_____

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN | : | |
| Plaintiff | : | CASE NO. ____ |
| -vs- | : | MOTION FOR TEMPORARY INJUNCTION |
| WILLIAM H. DAKOTA, et al | : | |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. ..

Now comes the plaintiff and respectfully represents to the Court that the defendants are exhibiting and showing to the public at the Cinema I Theatre, #69 Public Square, Lima, Ohio, two motion picture films entitled "Marriage Manual" and "Love Under 17" and the previews of coming attractions, and defendants have exhibited and shown the following films on the following dates:

(a) From July 12 -- July 18, 1972, the motion picture "Man and Wife";

(b) From July 19 -- July 23, 1972, the motion pictures "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions;

(c) From July 25 -- August 1, 1972, the motion pictures "The Hang-up" and "The Cutthroats" and the previews of coming attractions;

(d) From August 2 ~~-~~ August 8, 1972, the motion pictures "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions;

(e) From August 9 -- August 15, 1972, the motion pictures "Prostitution, Pornography U.S.A." and "Oddly Coupled" and the previews of coming attractions;

(f) From August 16 -- August 22, 1972, the motion pictures "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions;

(g) From August 23 -- August 29, 1972, the motion pictures "Midnight Plowboy" and "Tobacco Roody" and the previews of coming attractions.

(h) From August 30 -- September 5, 1972, the motion pictures "The Blue Hour" and "The Grabbers" and the previews of coming attractions;

(i) From September 6 -- September 12, 1972, the motion pictures "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions;

(j) From September 13 -- September 18, 1972, the motion

pictures, "Marriage Manual" and "Love Under 17" and the previews of coming attractions;

and that the defendants will, unless restrained, continue to exhibit and show to the public in the State of Ohio, the said motion picture films which have caused and will cause and result and have resulted in an immediate and irreparable harm and damage to the morals and welfare of the people of the State of Ohio, and that plaintiff has no adequate remedy at law.

Plaintiff therefore moves the Court for a preliminary injunction (a) enjoining and restraining the defendants, pendente lite, from maintaining such nuisance and (b) requiring an accounting of the box office receipts arising out of the exhibition and showing of the above named motion picture films; that the defendants be required to appear with the above named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box receipts arising out of the exhibition and showing of said motion picture films from the first exhibition thereof in the State to and including the final performance after termination of the appeal in favor of the State of Ohio; and the same be forfeited to the State of Ohio as contraband upon a final determination of the appeal in favor of the State of Ohio.

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

By_____

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | |
|---|---|
| STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN | : |
| Plaintiff | : CASE NO._____ |
| -vs- | : NOTICE FOR HEARING |
| WILLIAM H. DAKOTA, et al | : |
| Defendant | : |

.. .. .. .. .. .. .. .. .. .. .. .. .. ..

The defendants herein will take notice that a Motion for Temporary (Preliminary) Injunction will be for hearing before one of the Honorable Judges of the Court of Common Pleas of Allen County, Ohio, on the 26th day of September, 1972, at 9:30 o'clock A. M., at the Courthouse in Lima, Ohio, or as soon thereafter as the Court can hear the same.

_____
Assignment Commissioner

Filed Sept. 18, 1972

SUBPENA DUCES TECUM
CIVIL CASE
Revised Code, Sec. 2137.11-13,
2325.07, 311.17

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The State of Ohio, Allen County, Common Pleas Court

To William H. Dakota

John Doe #1 (Projectionist or Person of Persons in Possession of said films
John Doe #2

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 26th day of September A.D. 19 72 , at 9:30 o'clock A. M., to testify as a witness in a certain case pending in said Court, wherein State of Ohio, ex rel Lawrence S. Huffman Plaintiff , and William H. Dakota et al Defendant s ; and also that you bring with you and produce at the time and place aforesaid the following motion picture films:

1. "Man and Wife" for play dates July 12 -- July 18, 1972;

2. "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions for the play dates July 19 -- July 23, 1972.

3. "The Hangup" and "The Cutthroats" and the previews of coming attractions for the play dates July 25 --

August 1, 1972.

4. "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions for the play dates August 2 -- August 8, 1972.

5. "Prostitution, Pornography U.S.S." and "Oddly Coupled" and the previews of coming attractions for the play dates August 9 -- August 15, 1972.

6. "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions for the play dates August 16 -- August 22, 1972.

7. "Midnight Plowboy" and "Tobacco Roody" and the previews of coming attractions for the play dates August 23 -- August 29, 1972.

8. "The Blue Hour" and "The Grabbers" and the previews of coming attractions for the play dates August 30 -- September 5, 1972.

9. "Sweet Georgia" and "The Erotic Dreams of Casanova" and the previews of coming attractions for the play dates September 6 -- September 12, 1972.

10. "Marriage Manual" and "Love Under 17" and the previews of coming attractions for the play dates September 13 -- September 18, 1972.

11. "The Pig Keeper's Daughter" and "Please Don't Eat My Mother" and the previews of coming attractions for the play dates September 19 -- 25, 1972.

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the Pltf.

WITNESS my hand and the seal of said Court, this 18th day of September, 1972.

(SD) ROBERT H. DUNLOP
Clerk

By (SD) DONALD E. WEIDEMA
Deputy

# APPENDIX D

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al. Case No. 72 CIV 0326 (a Civil Action, in the Court of Common Pleas of Allen County, Ohio to abate the Cinema I Theatre as a public nuisance)

Papers included in Appendix: Page

Amended Complaint.....D3-10

D-3

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

PLAINTIFF

-vs-

CASE NO.
72 CIV 0326

WILLIAM H. DAKOTA aka
JACK DESMOND aks
WILLIAM KERN
2650 West Market Street
Lima, Ohio

AMENDED
COMPLAINT

and

FLORA MARY COLLINS MOOR
104 South Dale Drive
Lima, Ohio

and

LELAND SAMUEL COLLINS
510 River Street, R.D. #2
Madison, Ohio 44057

and

SARA LEE COLLINS (WALLACE)
1338 Monticello Boulevard,
North
Saint Petersburg, Florida
33073

and

PUSSY CAT CORPORATION
#69 Public Square
Lima, Ohio

Filed Sept. 20, 1972

or :

Los Angeles, California :

and :

CINEMA I THEATRE :
#69 Public Square
Lima, Ohio :

and :

JOHN BROWNELL :
1655 Reed Road
Lima, Ohio :

and :

ROBERT SMITH aka SISSON :
406 East North Street
Lima, Ohio :

and :

ALLEN R. BROWN :
2865 South Dixie Highway
Lima, Ohio :

and :

JOHN DOE #4 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

JOHN DOE #5
c/o Cinema I :
#69 Public Square
Lima, Ohio :

and :

GERALDINE SCOTT :
150 East 10th Street
Lima, Ohio :

and :

JANE DOE #2 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

All other persons unknown
claiming any ownership, :
right, title, or interest
in the property affected :
by the action.
:

DEFENDANTS

.. .. .. .. .. .. .. .. .. .. ..

Now comes Lawrence S. Huffman, plaintiff, and pursuant to Rule 15, Ohio Rules of Civil Procedure, amends his original complaint filed herein on September 18, 1972, as follows:

1. That the caption of the case is amended to the following form:

State of Ohio, ex rel Lawrence S. Huffman
127-129 North Pierce Street
Lima, Ohio
Plaintiff

-vs-

William H. Dakota aka
Jack Desmond
aka William Kern
2650 West Market Street
Lima, Ohio

and

Flora Mary Collins Moor
104 South Dale Drive
Lima, Ohio

and

Leland Samuel Collins
510 River Street, R.D.#2
Madison, Ohio 44057

and

Sara Lee Collins (Wallace)
1338 Monticello Boulevard, North
Saint Petersburg, Florida 33073

and

Pussy Cat Corporation
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

Cinema I Theatre
#69 Public Square
Lima, Ohio

and

John Brownell
1655 Reed Road
Lima, Ohio

and

Robert Smith aka Sisson
406 East North Street
Lima, Ohio

and

Allen R. Brown
2865 South Dixie Highway
Lima, Ohio

and

John Doe #4
c/o Cinema I
#69 Public Square
Lima, Ohio

and

John Doe #5
c/o Cinema I
#69 Public Square
Lima, Ohio

and

Geraldine Scott
150 East 10th Street
Lima, Ohio

and

Jane Doe #2
c/o Cinema I
#69 Public Square
Lima, Ohio

and

All other persons unknown claiming any ownership, right, title, or interest in the property affected by the action.

2. That paragraph 3 is amended to read as follows:

"That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises and building in which the Cinema I Theatre is operated and the legal description of said property is as follows:

Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet six (6) inches, more or less, off of the entire east end of said lot,

and that persons unknown have or claim ownership, right, title or interest in the property above described."

3. That paragraph 5 is amended to read as follows:

"That defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at said Cinema I Theatre; and that John Doe #4, John Doe #5 and Jane Doe #2, whose names plaintiff cannot discover are employed in said Cinema I Theatre."

4. That paragraph 6 is amended to read as follows:

"That the defendants, William H. Dakota, Flora Mary Collins Moor, Leland Samuel Collins, Sara Lee Collins (Wallace), Pussy Cat Corporation, John Brownell, Robert Smith aka Sisson, Allen R. Brown, John Doe #4, John Doe #5, Geraldine Scott, Jane Doe #2, and all other persons unknown claiming any ownership, right, title or interest in the property affected by the action are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre."

5. That paragraph 7 after subparagraph (J) is amended to read as follows: "That Appendices A -- G and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7(d) through 7(j), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached to the copies of the petitions to be served upon the defendants for the reason the costs of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court;" and that attached hereto and incorporated herein by reference is said Appendix G.

6. That subparagraph (c) of paragraph 10 is amended to read as follows: "Such conduct is demonstrated by the following vis-

ual depictions in the time and motion studies hereinbefore referred to as Appendices A -- G" and that subparagraph (c) of paragraph 10 after Appendix F is amended to read as follows: "APPENDIX G. 'Marriage Manual' and 'Love Under 17'. Lesbianism depicted on pages 2 and 3; sexual intercourse depicted on pages 7, 8, 9, 10, 11, 12, and 17; rape depicted on pages 14 and 1

Plaintiff Lawrence S. Huffman re-alleges as if fully rewritten herein each and every other allegation, including all appendices contained in his original complaint.

STATE OF OHIO

By_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read his original complaint and the foregoing amendments to his original complaint and that the facts and allegations in the foregoing amendments and his original complaint except as amended, are true as he verily believes.

_____

(Jurat omitted in printing)

# APPENDIX E

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al. Case No. 72 CIV 0326 (a Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theatre as a public nuisance)

Papers Included in Appendix: Page

Order of Common Pleas Judge Robert M. Light, Dated Oct. 24, 1972.....E3-5

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO ex rel :
LAWRENCE S. HUFFMAN
:
Plaintiff : CASE NO.
: 72 CIV 0326
-vs-
: O R D E R
WILLIAM H. DAKOTA, et al
:
Defendant Filed Oct. 24, 1972

This matter came on to be heard upon the verified complaint alleging facts constituting a nuisance, upon motion for a temporary injunction, on all and documentary evidence, upon oral and written agrument of counsel, and the Court being fully advised in the premises finds that a nuisance exists as alleged at the Cinema I Theatre at #69 Public Square, Lima, Ohio, and the same should be forthwith abated.

The evidence shows that the realty upon which the Cinema I Theatre is located is owned by the defendants, Leland Samuel Collins, Flora Mary Collins Moor and Sara Lee Collins Wallace. The evidence further shows that William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that defendants Robert Smith, Allen R. Brown, John Brownell and Geraldine Scott are employed at said theatre.

The Court orders the Cinema I Theatre at #69 Public Square, Lima, Ohio, closed forthwith for any purpose of lewdness, to wit: the projection or screening of lewd,

indecent, lascivious, or obscene films.

The defendants and all persons acting in any way in concert with them are hereby restrained from removing or in any manner interfering with the personal property and contents of the premises at Cinema I Theatre, #69 Public Square, Lima, Ohio, until further Order of the Court.

The officer serving this Order shall forthwith make and return into Court an inventory of the personal property and contents situated in the building at #69 Public Square, Lima, Ohio, and used in conducting or maintaining the motion picture projection and screening therein.

Any violation of this Order shall be a contempt of Court; any mutiliation or removal of this Order while the same remains in force shall likewise be a contempt of Court. The Court Orders that defendants show cause, if any they can, why this closing Order should not be made permanent as of this date.

(SD) ROBERT M. LIGHT
Robert M. Light, Judge

THE STATE OF OHIO )
: SS. CERTIFICATE
ALLEN COUNTY ) OF COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original ORDER now on file in said Clerk's office.

IN WITNESS WHEREOF, I have

(SEAL)

hereunto set my hand and affixed the seal of said Court at Lima, Ohio, the 24th day of Oct. A.D. 1972.

(SD) ROBERT H. DUNLAP
Clerk

By (SD) V.Bilopaulovich
Deputy

# APPENDIX F

William Dakota v. Sheriff Edward Fair of Allen County and Deputy Sheriff Joe Garlock, C72-384 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Complaint filed Oct. 26, 1972 (less Exhibits 1, 2 and 3).....F3-9

Motion for Temporary Restraining Order, filed Oct. 26, 1972.....F10

Motion for Preliminary Injunction, filed Oct. 26, 1972.....F11-12

Memorandum in Support of Motions for a Temporary Restraining Order and Preliminary Injunction, filed Oct. 26, 1972.....F13-23

Motion to Convene a Three Judge Panel, filed Oct. 26, 1972.....F24-27

Memorandum of Law on Effect of Removal on State Court Action, filed in Allen County Common Pleas Court on Oct. 26, 1972.....

F-3
Filed Oct. 26, 1972

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota<br>2650 Market Street<br>Lima, Ohio | ) | |
| Plaintiff | ) | Civil Action No. C 72-384 |
| -vs- | ) | |
| Sheriff Edward Fair<br>Sheriff of Allen County<br>Allen County Jail<br>Lima, Ohio 45801 | ) | COMPLAINT |
| and | ) | |
| Deputy Sheriff Joe Garlock<br>Deputy Sheriff of Allen County Special Investigator Assigned to the Allen County Prosecutor, Lawrence Huffman<br>Allen County Court House<br>Lima, Ohio 45801 | ) | |
| Defendants | ) | |

Plaintiff for his claim against Defendants states:

1. Plaintiff, William Dakota, is the manager and lessee of the Cinema I Theatre, #69 Public Square, in Lima, Ohio which shows motion picture films to the public.

2. Defendants, Edward Fair and Joe Garlock, are citizens and residents of Allen County, Ohio, occupying the official

position set forth in the caption.

3. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

4. This action arises under the First and Fourteenth Amendments to the Constitution, and this court has jurisdiction under 28 U.S.C. 1331. Jurisdiction is further based on 28 U.S.C. 1343, as this is an action to secure equitable relief for the protection of Plaintiff's civil rights pursuant to 42 U.S.C. 1983. Plaintiff also seeks a declaratory judgment under 28 U.S.C. 2201 and 2202.

5. This action seeks a temporary restraining order, preliminary injunction and permanent injunction to restrain the Defendants and their agents, representatives, employees, assigns and successors, from obstructing, hindering or otherwise interfering with Plaintiff's right to keep open the Cinema I Theatre, #69 Public Square, Lima, Ohio for the presentation to the public of motion picture films.

6. Plaintiff also seeks a declaratory judgment under 28 U.S.C. 2201 and 2202, declaring Ohio Revised Code 3767.01 to 3767.11 inclusive, to be in violation of the First and Fourteenth Amendments to the United States Constitution.

7. On September 18, 1972 Plaintiff, William Dakota, was made a Defendant in a case styled State of Ohio, ex rel, Lawrence S. Huffman v William H. Dakota; 72 Civ 0326 which was filed in the Allen County Court of Common Pleas. The Complaint prayed for the Allen County Court of Common Pleas to

(1) declare the Cinema I Theatre a nuisance; (2) that a preliminary injunction issue enjoining and restraining William Dakota from continuing to operate the Cinema I Theatre; (3) that there be an accounting of box office receipts and forfeiture of the same; (4) that William Dakota be restrained from exhibiting certain motion picture films named in the Complaint (See, Exhibit 1).

8. William Dakota was issued a subpoena duces tecum in State of Ohio, ex rel, Lawrence S. Huffman v William Dakota; 72 Civ 0326 requiring him to bring into court certain named films and business records (See, Exhibit 2). Plaintiff timely filed a Motion to Quash the subpoena duces tecum as a violation of his Fifth Amendment right and it was overruled by the court. Plaintiff timely filed a motion to declare the Ohio nuisance statutes unconstitutional in the state courts, but this motion was overruled.

9. A hearing was held in Allen County Court of Common Pleas before Judge Robert Light on October 24, 1972. He order the theatre closed (See, Exhibit 3).

10. A Motion to Stay the Order set forth in paragraph 9 was filed and denied by the Allen County Court of Common Pleas.

11. A hearing on the permanent injunction is scheduled for November 30, 1972 and December 1, 1972 (See, Exhibit 4). The Allen County Court of Common Pleas has made it known that November 7, 1972 will be an alternative hearing date on the permanent injunction if the court's schedule provides.

12. William Dakota had agreed to stipulate to the permanent order in the state court reserving all objections made in the hearing on the preliminary injunction. The State of Ohio, through Lawrence Huffman, has rejected this offer.

13. The order granting a preliminary injunction set forth in paragraph 9 is not a final appealable order under Ohio law. Only a permanent injunction can be appealed under Ohio law. Plaintiff's Cinema I Theatre must remain closed until the hearing on the permanent injunction and is left without an adequate remedy at law.

14. On October 24, 1972 at approximately 3:00 a.m. the Defendant, Joe Garlock, padlocked the Cinema I Theatre. Plaintiff cannot show any motion picture films to the public at the Cinema I Theatre due to the state court's order and the action of the Defendants in enforcing the same.

15. The films viewed by Judge Light in the state court proceedings are constitutionally protected and are not obscene.

16. The closing down and padlocking of the Cinema I Theatre pursuant to 3767.01 through 3767.11 of the Ohio Revised Code is unconstitutional since the aforecited sections are patently unconstitutional under the provisions of the First and Fourteenth Amendments to the United States Constitution and the most recent decisions of the Supreme Court of the United States since they have provided a basis to compose a prior restraint on free speech without a prior adversary hearing, deny procedural

due process, are overly vague and broad do not provide for a prompt, final judicial determination of the obscenity of the films in question, and fail to follow the standards of obscenity prescribed by decisions of the Supreme Court.

17. The acts of Defendants herein alleged are acts under color of state law subjecting Plaintiff, a citizen of the United States, to a deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and causing Plaintiff to be deprived of his rights hereinabove alleged under the First and Fourteenth Amendments to the Constitution, in violation of 42 U.S.C. 1983.

18. Plaintiff has suffered and will continue to suffer irreparable harm and injury by reason of the acts of the Defendants in closing the theatre and is without an adequate remedy at law and is being denied by a total prior restraint from exercising his rights under the Constitution.

WHEREFORE, Plaintiff prays for the following relief:

(a) That a declaratory judgment issue declaring 3767.01 to 3767.11 inclusive, of the Ohio Revised Code to be void as violative of the Constitution of the United States, both on their face and as invoked against the Plaintiff by the closing down and padlocking of the Cinema I Theatre.

(b) That a temporary restraining order, preliminary and permanent injunc-

tions issue restraining and enjoining the Defendants, their agents, servants, representatives and successors in office:

(1) From padlocking or attempting to close down the Cinema I Theatre and/or continuing the padlocking and enforced closure of the Cinema I Theatre.

(2) From padlocking or attempting to close down the Cinema I Theatre until the hearing on the permanent injunction is held in state court and/or continuing the padlocking and enforced closure of Cinema I Theatre until the hearing on the permanent injunction is held in state court.

(3) From preventing Plaintiff from exercising his rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States.

(c) For any and all other relief which the court may see fit to grant.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By (SD) T. IORIO
Ted Iorio

STATE OF OHIO )
: SS.
COUNTY OF LUCAS )

William Dakota, being first duly sworn according to law, deposes and says that he is the manager and lessee of the Cinema I Theatre, #69 Public Square, Lima, Ohio and is the Plaintiff herein; that he has read

the foregoing Complaint and knows the contents thereof and that the facts and allegations therein are true.

(SD) WILLIAM DAKOTA
William Dakota

(Jurat omitted in printing.)

F-10
Filed Oct. 26, 1972

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| William Dakota<br>Plaintiff<br>-vs-<br>Sheriff Edward Fair, et al<br>Defendants | )<br>)<br>)<br>)<br>) |
| | Civil Action No. C 72-384<br>MOTION FOR TEMPORARY RESTRAINING ORDER |

Now comes the Plaintiff, by and through his attorney, and requests the court to issue a temporary restraining order enjoining the Defendants from continuing the padlocking of the Cinema I Theatre, #69 Public Square, Lima, Ohio and enforcing the closure of the theatre. Plaintiff requests the temporary restraining order since Plaintiff's Cinema I Theatre is forcibly closed down and Plaintiff cannot invoke his First and Fourteenth Amendment right to free speech and will continue to suffer irreparable harm and be without an adequate remedy at law.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

F-11
Filed Oct. 26, 1972

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| | | Civil Action |
| Plaintiff | ) | No. C 72-384 |
| -vs- | ) | MOTION FOR PRELIMINARY |
| Sheriff Edward Fair, et al | ) | INJUNCTION |
| Defendants | ) | |

Now comes the Plaintiff, by and through his attorney, and requests the court to set a hearing date to determine whether a preliminary injunction will issue granting injunctive and declaratory relief requested by the Plaintiff in the Complaint filed herein and preventing Defendants from continuing to padlock and enforce the closure of the Cinema I Theatre and from threatening or obstructing, hindering or otherwise interfering with Plaintiff's right of freedom of expression. Without a hearing on the Motion, Plaintiff will continue to suffer irreparable harm and be without the benefit of an adequate remedy at law.

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

NOTICE OF HEARING

Defendants will please take notice that the foregoing Motion will be heard before the Honorable , United States District Court Judge, U.S.

Court House, Toledo, Ohio, on the day of at in the United States District Court for the Northern District of Ohio, Western Division, 213 U.S. Court House and Customs Building, 1716 Spielbusch Avenue, Toledo, Ohio 43624.

IT IS ORDERED: _____

F-13
Filed Oct. 26, 1972

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| Plaintiff | ) | Civil Action No. C 72-384 |
| -vs- | ) | MEMORANDUM IN SUPPORT OF |
| Sheriff Edward Fair, et al | ) | MOTIONS FOR A TEMPORARY RE- |
| Defendants | ) | STRAINING ORDER AND PRE- |
| | ) | LIMINARY IN- |
| | ) | JUNCTION |
| | ) | |

FACTS

The facts at bar can be simply stated. Plaintiff at bar was the party Defendant in Huffman v. Dakota; 72 Civ 0326 wherein the Plaintiff, Huffman, asked, among other requests for relief, a complete closing of the Cinema I Theatre which Plaintiff at bar manages and is the lawful lessee. After a hearing in state court, where Plaintiff at bar timely raised the question of the constitutionality of the nuisance statute (3767.01 to 3767.11, Ohio Revised Code), the state court ordered the closing of the theatre.

It is Plaintiff's contention that the Ohio nuisance statute is constitutionally deficient since it permits a total prior restraint preventing the Plaintiff at bar from showing any motion picture films in the future. Plaintiff's contention and others are supported by the rationale to follow.

UTILIZATION OF 3767.01, OHIO REVISED CODE TO ENJOIN THE DISSEMINATION OF FREE SPEECH MATERIAL IS VIOLATIVE OF THE PLAINTIFF'S RIGHTS BECAUSE: (1) THE STATUTE AS APPLIED TO FREE SPEECH MATERIAL IS UNCONSTITUTIONAL; (2) THE STATUTE DOES NOT PROVIDE A PROPER STANDARD FOR DETERMINING WHETHER A MOTION PICTURE FILM IS, IN FACT, OBSCENE; (3) THE STATUTE DOES NOT PROVIDE A PROMPT FINAL JUDICIAL DETERMINATION NECESSARY TO SATISFY THE CONSTITUTIONAL REQUIREMENTS.

The primary issue before this Court is whether the Ohio state statutory nuisance scheme as applied to free speech material is unconstitutional as a prior restraint of the exercise of the right of free speech and press as guaranteed by the First and Fourteenth Amendments to the United States Constitution. 3767.04, Ohio Revised Code provides:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the Court or judges that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Ohio Revised

> Code, the court adjudged shall forthwith issue an order closing . . . . the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein."

The above-quoted section of the Ohio Code clearly indicates that the Court may close the theatre in question from future showings of any free speech material.

In Near v. State of Minnesota, 283 U. S. 697, the United States Supreme Court held invalid a statute which is parallel to the statute at bar whereby the State of Minnesota attempted to enjoin a newspaper as a nuisance from continuing publication.

The lower Court in Near, ruled that the "Saturday Press" was a public nuisance and that it be abated and perpetually enjoined

> "from producing, editing, publishing, circulating, having in their possession, selling, or giving away any publication whatsoever which is malicious, scandalous, or defamatory newspaper as defined

> by law, and also from further conducting said nuisance under the name and title of said 'Saturday Press' or any other name of title."

The Defendant in Near, appealed to the United States Supreme Court which stated as follows:

> "This statute for the suppression as a public nuisance of a newspaper or periodical is unusual if not unique and raises questions of great importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty, safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

The Court went on to point out that whatever harm may have been caused by the newspaper could have been remedied by the libel laws in Minnesota. The Court continued addressing itself to the prior restraint which the state order permitted. The Court commented:

> "The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

Simply stated, the Court in Near, rejected in toto any prior restraint judicial or legislative which would deny an individual his right to publish or screen any free speech material.

Since Near, which is a landmarked case in this area, numerous courts have followed its dictates. In Oregon Bookmark Corp. v. Schrunk, 321 F. Supp. 639, the District Court ruled unconstitutional a city ordinance. That ordinance permitted the City Council to refuse to issue a license for the sale of books in a book store if the City Council deemed that store a nuisance.

The Court in Oregon Bookmark, addressed itself to the question whether a city has the constitutional power to employ a nuisance law for the purpose of censoring undesirable publications. The Court addressed that question in the following manner:

"It is immaterial, however, whether the books examined by the Court are obscene. I assume they are, but the ordinance is unconstitutional on its face. It, therefore, makes no difference that it sweeps up the obscene in this case. It is capable of sweeping up the nonobscene as well. The defect in the ordinance is that it permits a type of censorship which depends upon the uncontrolled discretion of the City Council as censor."

The Court continued:

"The city also urges that the Court should not require the city to license a public nuisance, but this argument is circular and it begs the question of whether tradi-

tional nuisance regulation is consistent with the First Amendment right. It is one thing to abate the sale of filthy food and another to abate the sale of filthy books. The food business is not protected by the First Amendment"

Similarly, at bar the Ohio nuisance statute provides in the event that the Court closes the theatre for a sweeping up of the obscene as well as the "sweeping up of the non-obscene."

In Grove Press v. Philadelphia, 418 F. 2d 82, the Third Circuit Court of Appeals affirmed the lower court's ruling that the Pennsylvania authorities could not under the theory of nuisance enjoin the showing of the motion picture "I Am Curious - Yellow." The Court stated:

> "The city's attempt to enjoin the continued exhibition of 'I Am Curious - Yellow' on the grounds that such an exhibition is a nuisance is a procedure repugnant to the due process clause of the Fourteenth Amendment in two aspects. First, the substance of standard by which the alleged obscenity of the movie is to be judged is so broad as to sweep within its purview constitutionally protected activities; and second, the standard is vague." (See, Grove Press v Philadelphia, 300 F. Supp. 281.)

In State ex rel Little Beaver Theatre v Tobin, 258 So.2d 30, the Appellate Court in Florida ruled that an injunction against the showing of certain films in the future

was too broad in scope where it did not have reference to the films seized or to any specific films.

In Mitchum v Florida, 257 So.2d 883, the Supreme Court of Florida overruled the lower Court which granted a permanent injunction enjoining the Defendants from selling obscene or pornographic materials and permanently enjoining him from further operation or maintenance of the business in the community. The Supreme Court of Florida as stated reversed and declared the injunction invalid in the following manner:

> "A business involved in the dissemination of publications cannot be declared a nuisance in this manner." (Near v Minnesota, supra)

As set forth previously in this memorandum, the Ohio nuisance statute provides for the complete shut down of the theatre at bar. The statutes permit this Court to put the theatre in question out of business and such action by this Court would constitute a prior restraint against the Plaintiff denying him the right to show whatever movie he chooses to show in the future without having any prior judicial determination as to whether the particular film involved is declared to be constitutionally obscene. As such, the statute in question by its very nature and purpose is invalid and unconstitutional and falls within the boundaries of the rationale of Near v Minnesota, and the other cases as aforecited.

In addition to the prior restraint problem, the Ohio nuisance statute provides no standard whatsoever for a proper judicial determination of whether a motion pic-

ture is obscene pursuant to Supreme Court standards. There are no guidelines set out, there are no references to other statutory definitions, there is no way in which the exhibiting of a motion picture could make a prior determination in choice as to whether he wished to show a motion picture film or not to avoid the far-reaching consequences of the Ohio nuisance statute.

In Interstate Circuit, Inc. v. Dallas, 398 U.S. 676, the United States Supreme Court set down an ordinance because of the vague and indefinite definition of obscenity given by the ordinance. The hazards of a vague definition as set forth in the Interstate Circuit case are borne out by the Supreme Court in the following manner:

> "Vagueness and the attended evils we have earlier described, are not rendered less objectionable because the regulation of expression is one of a classification rather than direct suppression."

In the case at bar, the Ohio nuisance statute provides no guidelines whatsoever as to what is "lewd, indecent, lascivious or obscene." (See, 3767.01 O.R.C.)

By comparison the ordinance in Interstate Circuit, at least contained vague guidelines. However, at bar the guidelines to determine what is obscene are totally absent.

Even assuming, that the definition of obscenity as contained in 2905.34 O.R.C. is meant to be absorbed as the definition in the Ohio nuisance statute, the statute would still be unconstitutionally vague.

The definition of obscenity as contained in 2905.34 goes far beyond the definition of obscenity as set forth by the Supreme Court in Redrup v New York, 367 U.S. 154. In either event the statute must fail as being unconstitutionally vague.

In Friedman v Maryland, 380 U.S. 51, the Defendant therein was convicted in the Maryland state court for a violation of a provision in the Maryland movie picture censorship statute making it unlawful to exhibit a film without having obtained a license first. The Defendant contended that the statute in its entirety was unconstitutional and was a prior restraint. On appeal, the Supreme Court of the United States reversed.

The Court in Friedman, premised the reversal on the fact:

> "It is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination."

At bar, the Ohio nuisance statute lacks any assurance of a prompt judicial determination regarding the obscenity of the material in question. At bar, there is absolutely no time limit in which the hearing on the preliminary injunction must be held. Furthermore, there is nothing in the Ohio Appellate Procedure which provides for a speedy and expeditious appeal of an adverse decision to the Plaintiff.

The Court in Grove Press v Philadelphia, supra, also commented on the impropriety of the Pennsylvania nuisance statute:

> "Citing Friedman, the Court also viewed the Pennsylvania procedures in equity as an additional threat to the freedom of expression because they fail to guarantee prompt judicial determination of the First Amendment issue which was the subject of the preliminary restraint."

In Duggan v 807 Liberty, 288 A.2d 750, the Supreme Court of Pennsylvania overruled the lower court's decision enjoining the showing of a movie pursuant to the nuisance statute because:

> "The Pennsylvania Rules of Civil Procedure simply do not designate when the final hearing must be held subsequent to the granting of a preliminary injunction."

The above-quoted language is readily applicable to the statute at bar.

In Meyer v Austin, 319 F. Supp. 457, the Federal Court declared the Florida obscenity statute unconstitutional in its entirety:

> "Although section 841.011 provides for an expedited trial procedure to minimize incursions on the right of protected expression, the statute makes no provision whatever for the expedited appellate consideration by the District Courts of Appeal. Because no prompt review is specified by law and unwarranted delay can occur before a final decision is reached, and

during that delay the evanescent right of freedom on expression might be lost."

Again, by the same token the Ohio nuisance statute does not provide for an expedited appellate consideration by the Ohio appeals courts (See, Louisiana v Gulf States, 255 So.2d 857).

In conclusion, the Plaintiff requests that this Court grant the temporary restraining order as prayed for in the Complaint.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By (SD) TED IORIO
Ted Iorio

F-24

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| | ) | Civil Action |
| Plaintiff | ) | No. C 72-384 |
| -vs- | ) | MOTION TO CONVENE A |
| Sheriff Edward Fair, et al | ) | THREE JUDGE PANEL |
| Defendants | ) | |

Now comes the Plaintiff, by and through his attorney, and requests the court pursuant to 28 U.S.C. 2281 and 28 U.S.C. 2284 to convene a three judge panel.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

Filed Oct. 26, 1972

F-25
Filed Oct. 26, 1972

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| State of Ohio, ex rel Lawrence S. Huffman<br><br>Plaintiff | ) | Civil Action No. 72-Civ-0326 |
| -vs-<br><br>William H. Dakota, et al<br><br>Defendants | ) | MEMORANDUM OF LAW ON EFFECT OF REMOVAL ON STATE COURT ACTION |

It is brought to the court's attention that the above-styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division that this memorandum is intended to show the effect of said removal upon the above-styled action.

The filing of a Petition for Removal under the statutes governoring the procedures for removal effects an automatic removal from state court to Federal District Court, and such removal stops any further proceeding in state court pending the District Court's action. 28 U.S.C., Section 1446 (e).

Compliance with the form and procedure of the removal under 28 U.S.C., Section 1446 is all that is necessary to effect automatic removal from the state court to the District Court. Baltimore and Ohio Railroad Company vs Koontz, 104 U.S. 5, 14, 26 L.Ed. 643 (1881); Flowers vs Aetna Casualty and Surety Company, 163 F.2d 411, 415 (C.A. 6, 1967); Lowe vs Jacobs, 243 F.2d

432 (CA 5, 1957); Southern Pacific Company vs Haight, 126 F.2d 900 (CA 9, 1942).

The removal ends the power of the state court to issue any orders because the entire case has been removed. Allman vs Hanley, 302 F 2d 559 (CA 5, 1962). See also, Adair Pipeline Company vs Pipeliners Local Union #798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd. 325 F.2d 206 (CA 5, 1962). Herein it was held that presentations to the judge of the state court in open court at hearing on the Plaintiff's motion for temporary injunction of a copy of a Petition to Remove the case to federal court which the judge was obligated to turn over to the clerk of the state court regardless of whether he actually did so, was sufficient compliance by Defendants' attorney with statutory requirement that a copy of the Petition for Removal must be promptly filed with the clerk of the state court and the judge of the state court was on notice that the case had been removed and that he could proceed no further therein. (Emphasis supplied.)

After compliance with the removal statute the state court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are federal questions and must be decided in Federal Court. Lowe vs Jacobs, 243 F.2d 432 (C.A. 5, 1957).

For the above reasons, Defendants have complied with the removal statute, there is respectfully suggested that this court no longer has any jurisdiction in this matter

and is without power to proceed further.

(SD) TED IORIO
Ted Iorio
435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

(SD) GILBERT DEITCH
Gilbert Deitch
Suite 2005
1175 Peachtree Street,N.E.
Atlanta, Georgia 30309
(404) 892-8890

(Certificate of Service omitted in printing.)

# APPENDIX G

William Dakota v. Sheriff Edward Fair et al. (72-384) (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Opinion and Order of United States District Judge Nicholas J. Walinski, dated Nov. 2, 1972.....G3-5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| William Dakota | ) |
| | C 72-384 |
| Plaintiff, | ) |
| vs. | ) OPINION AND ORDER |
| Sheriff Edward Fair, Sheriff of Allen County, et al. | ) |
| | ) (Filed Nov. 2, 1972) |
| Defendants. | ) |

This cause came to be heard on an application for temporary restraining order under Federal Rule of Civil Procedure 65.

The plaintiff herein, operator of a theatre in Lima, Ohio, seeks relief from an order of the Allen County Common Pleas Court pursuant to Ohio Revised Code § 3767.01, et seq. The theatre and all the equipment necessary for its operation have been padlocked as a nuisance under the procedures set forth in O.R.C. § 3767.04. It is the opinion of this Court that the State injunction has been overbroadly applied. The statute, in pertinent part provides for a temporary injunction:

> "closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction."

As applied in the instant case, the actions of the State Court fly directly in the face of the United States Supreme Court decision in Near v. Minnesota, 283 U.S. 697 (1931). In that case, a similar

---

Notation by Court Clerk on bottom p.1:

In conformity with Rule 77 (d) F.R.O.P. please take notice that the following order of judgment was entered in this court on NOV 2 1972.

Dominic J. Cimino, Clerk

---

state statute provided for the total closing of a newspaper for its prior violations of the state statute on libel. The Supreme Court held that such blanket prohibitions were constitutionally impermissible prior restraint of the exercise of free speech.

The Ohio Statute at bar does not present such an issue. Defendant herein is enjoined only from the exhibition of material which falls within the Supreme Court's definition as "obscene". See State ex rel Keating v. Vixen, 27 Ohio St.2d 278 (1971). It must be assumed that the Ohio Courts will confine the injunction to material held obscene under the tests enunciated by the Supreme Court, and therefore beyond the protection of the First Amendment. Id at 280.

Since the Ohio Court may interpret the abovementioned statute constitutionally upon hearing for the permanent injunction this Court will reserve a ruling on the convening of a three judge

panel under 28 U.S.C. § 2284 until such time as the federal abstention doctrine is inapplicable.

For the reasons set out above, it appearing to the Court that the petition for a temporary restraining order is well taken, in part, it is

ORDERED that the state injunction be stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing.

(SD) NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

# APPENDIX H

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (a Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theatre as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Nov. 5, 1972.....H3-4

Journal Entry of Nov. 5, 1972.....H5-6

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO, et rel :
LAWRENCE S. HUFFMAN
: Case No.
Plaintiff : 72 CIV 0326
:
vs
: MOTION
WILLIAM H. DAKOTA et al
: (Filed Nov. 5, 1972)
Defendants

- - - - - - - - - - - - - - - - - - - - - - - -

Plaintiff says that on October 24, 1972, the Court ordered the Cinema I Theater, #69 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, indecent, lascivious or obscene films, and that the defendant, William H. Dakota, was personally served a copy of said Order.

Plaintiff says that the defendant, William H. Dakota, has violated the terms of said Order by exhibiting in said theater on November 4, 1972, obscene motion picture films entitled "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" which depict numerous scenes of sexual intercourse, cunnilingus and fellatio.

WHEREFORE, plaintiff requests that the Court direct the defendant, William H. Dakota, to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obscene, and upon such determination, to require the defendant to show cause why he should not be punished as for a contempt for his disobedience.

Lawrence S. Huffman, Plaintiff

State of Ohio

SS

County of Allen

Lawrence S. Huffman, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations therein contained are true as he verily believes.

_____

Lawrence S. Huffman

(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS
OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Plaintiff

vs

WILLIAM H. DAKOTA et al

Defendants

Case No.
72 CIV 0326

JOURNAL ENTRY

(Filed Nov. 5, 1972)

- - - - - - - - - - - - - - - - - - - - - -

Upon sworn charges filed with the Clerk of Courts against William H. Dakota alleging disobedience of the said William H. Dakota to the former order of this Court directing the nonexhibition of obscene motion picture films at the Cinema I Theater, #69 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said William H. Dakota directing him to appear before this court on November 7, 1972, at 9:00 AM, and to bring with him at such time the motion picture films "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" so that a determination might ~~be made~~ as to whether said films are obscene, and upon such determination, to show cause why he should not be punished as for a contempt for his disobedience.

(SD) ROBERT M. LIGHT
Judge

THE STATE OF OHIO,)
) SS
Allen County )

CERTIFICATE OF
COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

(SEAL)

IN WITNESS WHEREOF, I have here unto set my hand and affixed the seal of said Court of Lima, Ohio, this 5 day of November, A.D. 19 72.

(SD) ROBERT H. DUNLAP Clerk

# APPENDIX I

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota, et al.
Case No. 72 CIV 0326
(A Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theatre as a public nuisance)

Papers Included in Appendix: Page

Judgment Entry of Court of Common Pleas of Allen County, Ohio, dated Nov. 30, 1972, closing Cinema I Theatre for a period of one year unless sooner released by order of court .....I3-7

IN THE COURT OF COMMON PLEAS
OF ALLEN COUNTY, OHIO

THE STATE OF OHIO ex rel :
LAWRENCE S. HUFFMAN
:CASE NO.
Plaintiff 72 CIV 0326
:
-vs-
: JUDGMENT
WILLIAM H. DAKOTA et al ENTRY
:
Defendant (Filed Nov. 30, 1972)

This cause came on to be heard on the plaintiff's verified complaint and amended complaint and application for a permanent injunction, forfeiture of gross receipts received from exhibiting certain motion picture films, and plaintiff's costs, and the Court having considered the same, and having heard and considered the oral and documentary evidence presented, and having considered the arguments of counsel representing the parties, and having considered the evidence received upon plaintiff's motion for temporary (preliminary) injunction, pursuant to Ohio Rules of Civil Procedure 65(B), the Court finds the allegations of plaintiff's complaint and verified complaint are true and more specifically finds as follows:

(1) That the Cinema I Theater is operated by defendant William H. Dakota.

(2) That defendant, William H. Dakota, has engaged in a course

of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or represention of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.

(3) That this conduct and the continuous exhibition of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code;

(4) That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises being used by the defendant, William H. Dakota, to engage in the conduct which constitutes a nuisance;

(5) That during the period beginning the first week of August, 1972, until the issuance of the preliminary injunction on October 24, 1972,

the bank records of the defendant, William H. Dakota d/b/a Cinema I Theater disclosed deposits in the amount of

(6) That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace), the owners of the premises at #69 Public Square in Lima, Ohio, leased said premises to the defendant, William H. Dakota, under the name of William Kern, Jr.;

(7) That the defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at the said Cinema I Theater;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

(1) That the defendants and all of the persons acting in concert or participation with them are hereby permanently enjoined and restrained from conducting the said nuisance;

(2) That the amount of Three Hundred Dollars ($300.00) deposited in the bank account of William H. Dakota d/b/a Cinema I Theater shall be forfeited to the State of Ohio and judgment is hereby rendered against the defendant, William H. Dakota, in said amount of Three Hundred Dollars ($300.00);

(3) That all personal property and con-

tents used in conducting the nuisance as aforedescribed shall be removed from #69 Public Square, Lima, Ohio, and this personal property belonging to the defendants shall be sold in the manner provided for the sale of chattels under execution;

(4) That the Order of the Court closing the Cinema I Theater, issued by way of preliminary injunction dated October 24, 1972, shall be extended, and further, the place located at #69 Public Square, Lima, Ohio, and more particularly described as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot,

is Ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio.

(5) That the defendant, William H. Dakota, pay the costs herein. Judgment for costs. To all of which the defendants except.

(SD) ROBERT M. LIGHT
Judge

THE STATE OF OHIO,)
Allen County, ) SS. CERTIFICATE OF
) COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, the 30th day of November, 1972

(SEAL)

ROBERT H. DUNLAP Clerk

(Illegible)E. Coleson

## APPENDIX J

Pursue, Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al., C 72-432 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Complaint filed Dec. 1, 1972.....J3-18

Temporary Restraining Order of United States District Judge Nicholas J. Walinski, filed December 1, 1972.....J19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| Pursue, Ltd., a Delaware corporation<br><br>Plaintiff<br><br>-vs-<br><br>Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio<br><br>and<br><br>Edward Fair in his capacity as Sheriff of Allen County, Ohio<br><br>Defendants<br><br>Also serve, in their statutory capacity only, under 28 U.S.C., Section 2284 (2), and not as Defendants<br><br>His Excellency, John Gilligan, Governor of the State of Ohio, State House Annex Columbus, Ohio<br><br>and<br><br>The Honorable William Brown, Attorney General of the State of Ohio State House Annex Columbus, Ohio | Civil Action No. C 72-432<br><br>COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND CONVOCATION OF THREE-JUDGE COURT<br><br>(Filed Dec. 1, 1972) |

TO THE HONORABLE, THE JUDGES
OF SAID COURT:

Plaintiff, by and through its attorneys-at-law, Ted Iorio, Esquire, Gilbert H. Deitch, Esquire and Robert Eugene Smith, Esquire, complaining of Defendants herein, jointly and severally, respectfully alleges as follows:

I.

JURISDICTION

1. This is a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants, and each of them, from acting under the law of Ohio to close Plaintiff's place of business as a "nuisance," as that term is understood under Ohio law, Ohio Revised Code, Sections 3767.01 et seq. Plaintiff prays, as well, a declaratory judgment to determine the constitutionality of the procedures of Defendants to abate a "nuisance" under said law, as written and/or as applied herein. Plaintiff prays for a three-judge court to make such determination.

2. This is also a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants from acting under Sections 3767.01 et seq. of the Ohio Revised Code to prohibit the dissemination of any motion picture films at Cinema I Theatre, 69 Public Square, Lima, Ohio.

3. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions herein presented by 28 U.S.C., Section 1343 (3), which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the Constitution of the United States . . . .",

and the organic law which authorizes the institution of this suit founded on 42 U.S.C., Section 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. Suit is further founded on 28 U.S.C., Section 1343 (4) "to recover damages or to secure equitable or other relief under any act of Congress providing for the

protection of civil rights . . . .," as well as Article III, Section 2 of the Constitution of the United States.

5. Prayer for Injunctive Relief is founded on Rule 65 of the Federal Rules of Civil Procedure.

6. Prayer for Declaratory Relief is founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C., Section 2201.

7. Jurisdiction for convocation of a Three-Judge Court is founded on 28 U.S.C., Sections 2281 and 2284.

II.

PARTIES

8. Plaintiff, Pursue, Ltd., is engaged, through its agents, servants and employees, in the dissemination of movies which are presumptively protected under the First Amendment to the Constitution of the United States.

9. The materials disseminated by Plaintiff, Pursue, Ltd., are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No persons under eighteen (18) years of age (minors) are allowed entrance within Plaintiff's theatre, nor is there "pandering" in the Ginzburg sense, nor are the materials disseminated in such a way

that unwilling persons cannot avoid them.

10. Upon information and belief, Lawrence S. Huffman, is named as a Defendant in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

11. Upon information and belief, Edward Fair is named as a Defendant in his capacity as Sheriff of Allen County, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

12. The named Defendants, in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgment and/or other order that may issue by this court.

III.

FACTUAL ALLEGATIONS

13. At all times relevant hereto, Defendants and/or their agents, servants or employees, and others acting under their direction and control, and each of them, separately and in concert. under color and pretense of law, to-wit, under color of state statutes referred to hereinabove, have deprived and are continuing

to deprive Plaintiff, its agents, servants and employees of rights, privileges and immunities guaranteed to them by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, as well as depriving adult citizens of the City of Lima, the State of Ohio, and visitors thereto, of access to nonobscene materials protected by the First Amendment to the Constitution of the United States, offered for exhibition under nonobtrusive circumstances to interested adults only.

14. Plaintiff adopts by reference and incorporates herein the factual allegations of the Complaint filed with this Court in the case of William Dakota v. Sheriff Edward Fair, Docket No. C 72-384, filed October 26, 1972.

15. On November 17, 1972 Plaintiff purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment for valuable consideration all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio.

16. The purchase and assignment of lease referred to above became effective November 17, 1972 and Pursue, Ltd. commenced to operate Cinema I, 69 Public Square, Lima, Ohio.

17. On November 30, 1972, in the Court of Common Pleas of Allen County, Ohio, the Honorable Robert M. Light, Judge, heard testimony in the case of State of Ohio, ex rel Huffman v. William Dakota, et al., No. 72 Civ 0326 upon the

State's application for a permanent injunction against Defendants therein.

18. On November 30, 1972 at approximately 2:30 p.m. the Court issued an order of permanent injunction against Defendants thereby ordering the closing of Cinema I for one (1) year and ordering the property therein sold pursuant to Ohio law, Sections 3767.01 et seq. of the Ohio Revised Code. Within two (2) hours the theatre was padlocked and the keys of Plaintiff's employee were seized by law enforcement agents.

19. Notwithstanding this Court's opinion and order entered November 2, 1972 in Dakota vs Fair, et al., No. C 72-384, the Honorable Robert M. Light failed to comply with this Court's opinion as to the impermissibility of Prior Restraints upon Free Speech and Press guaranteed by the First Amendment to the Constitution of the United States, and effectively enjoined the dissemination of any and all motion picture films, whether or not sexually oriented. (Exhibit A)

20. Said nuisance action has imposed a prior and indeed, permanent, restraint, upon the dissemination of materials presumptively protected by the First Amendment to the Constitution of the United States and is designed to have a "chilling effect" upon the exercise of said freedoms by Pursue, Ltd.

21. The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, under facially invalid statutes, attempting the ulti-

mate suppression of presumptively protected motion picture films without, to this date, ever having had any final judicial determination that any of said motion picture films of Plaintiff are, in fact obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the city of Lima and the State of Ohio and who wish to exercise their First Amendment right to view nonobscene motion picture films. The efforts on the part of Defendants to close Plaintiff's business and the closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and which might be apropos in a police state, but is anathema to a free society such as ours.

IV.

BASIS IN LAW FOR RELIEF

22. The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close Plaintiff's business under the guise of abating a nuisance under the conditions here present is a "prior restraint," condemned by the Con-

stitution of the United States and has a "chilling effect" on the exercise of Plaintiff's constitutional rights, more particularly the First and Fifth Amendments thereof, as made obligatory on the states under the Fourteenth Amendment. The conduct of Defendants, their agents, servants, and employees, in seeking to close Plaintiff's business is deprivation of Plaintiff's rights to due process under the Fifth Amendment to the Constitution, as well as an all-too-effective restraint on the exercise of Plaintiff's right to see, disseminate and distribute presumptively protected material to the interested adult public.

23. As a further result of the conduct of the Defendants, their agents, servants, employees and attorneys, the Plaintiff has been intimidated in its trade and business, and if the business remains closed, it will suffer complete loss of profits, as well as damages as a result of the substantial interference with its advantageous business relations.

24. By reason of the conduct of the Defendants, their agents, servants, employees and attorneys, as aforesaid, the civil rights of Plaintiff under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, have been violated to its irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorneys, will continue in the course of conduct to Plaintiff's further imminent and irreparable harm, for which it has no plain adequate remedy at law, and the conduct of Defendants, their agents, servants, employees and attorneys, has had and threat-

ens to have a continuing "chilling effect" on the Plaintiff's exercise of its First Amendment freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Plaintiff if a preliminary injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed, wholly illegal conduct as aforesaid, under color of enforcing said state statutes and nuisance laws to Plaintiff.

25. The aforesaid Ohio nuisance law, Section 3767.01 et seq. of the Ohio Revised Code, are as written and/or as applied to Plaintiff, repugnant to the Constitution of the United States for the following reasons:

(a) Said statutory provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such, are repugnant to the Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States; and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute and law set forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in First Amendment matters; and further,

(c) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedom, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the federal and state constitutional rights of citizens of the State of Ohio and the United States, as well as those of Plaintiff, to publish, disseminate, distribute, circulate, sell, receive and/or purchase movies and printed publications; and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limiting the exercise by Plaintiff of First Amendment freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States by employing means lacking adequate safeguards which Due Process demands to assure non-obscene materials sought to be disseminated as a business activity, the constitu-

tional protection of the First Amendment, to which they are entitled; and further,

(f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution in that said provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's First Amendments rights by Defendants.

26. Said statutory provisions are repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States for the following reasons:

(a) Said statutes as written and/or as applied to Plaintiff constitute a classical "prior restraint," on materials which are presumptively protected under the First Amendment to the Constitution of the United States, which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with Near v Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) and continuing through 1971 with its decisions in New York Times Company vs United States, 403 U.S. 713 (1971), and Organization for a Better Austin vs Keefe, 402 U.S. 415, 29 L.Ed.2d 1 (1971).

(b) Said law of nuisance denies Due Process and Equal Protection of the Laws to Plaintiff in that said law makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of iso-

lated transactions as to a few of possibly thousand of presumptively protected motion picture films without any showing of traditional elements necessary to constitute a continuing public or common nuisance; all of which is repugnant to the First, Fifth and Fourteenth Amendments to the United States Constitution;

(c) Moreover, the Ohio law of nuisance, by labelling a place of business a nuisance on the basis of isolated transactions, creates an invalid presumption of the type condemned by the United States Supreme Court in Leary vs United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 56, in that it violates the Fifth and Fourteenth Amendments of the Constitution of the United States;

(d) Moreover, said presumption deprives Plaintiff of its Fifth and Fourteenth Amendment rights under the Constitution of the United States to have every element making up a nuisance to be proven, by competent evidence, in a First Amendment context, beyond a reasonable doubt.

V.

RELIEF SOUGHT

27. Plaintiff is further entitled to and desires that this Court enter a declaratory judgment on final hearing under the provisions of 28 U.S.C. Section 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring Ohio nuisance law, Section 3767.01 et seq. of the Ohio Revised Code, as written and/or as applied, unconstitutional.

28. Plaintiff is entitled to and desires that a three-judge court be convened to determine the constitutionality of said statute Sections, pursuant to 28 U.S.C.,Sections 2281 and 2284.

29. Plaintiff is entitled to and desires that this Court issue a temporary restraining order, a preliminary and permanent injunction restraining and enjoining each of the Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiff in the action referred to in Paragraph17 hereof.

WHEREFORE, Plaintiff prays:

1. That a three-judge court be convened to hear and decide the issues raised herein.

2. That a temporary restraining order, restraining Defendants, and/or their agents, servants, employees and attorneys, pending a hearing and determination of Plaintiff's application for permanent injunction from continuing to proceed against Plaintiff in the action referred to in Paragraph 17 hereof.

3. That after final hearing, said injunctions be made permanent and said statute Sections and law of nuisances referred to hereinbefore be declared unconstitutional as written and/or as applied to the controlled dissemination of adult-type materials to persons eighteen (18) years of age or older in a nonobtrusive

manner, absent Ginzburg-type pandering, by Plaintiff herein.

4. That a permanent injunction issue restraining Defendants, their agents servants, employees and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statute Sections and law referred to above in an unconstitutional manner, or to apply them in a manner to obtain unconstitutional results with respect to this Plaintiff, its agents servants and employees and (b) otherwise harassing Plaintiff in the conduct of its lawful business without first securing and providing for, after due notice to Plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense.

5. That the Governor and the Attorney General of the State of Ohio be given notice by registered mail of the pendency of Plaintiff's application for preliminary and permanent injunction as required by 28 U.S.C., Section 2284 (2).

6. That Plaintiff have such other and further relief as may be appropriate under the circumstances in this case, together with costs.

Respectfully submitted,

(SD) TED IORIO
Ted Iorio, Esquire
435 S.Hawley Street
Toledo, Ohio 43609
(419) 248-5351

(SD) GILBERT H. DEITCH
Gilbert H. Deitch, Esquire
Suite 2005
1175 Peachtree Street,N.E.
Atlanta, Georgia 30309
(404) 892-8090

(SD) ROBERT E. SMITH
Robert Eugene Smith,Esquire
Suite 507
102 West Pennsylvania Av.
Towson, Maryland 21204
(301) 821-6868

COUNTY OF LUCAS )
: SS. A F F I D A V I T
STATE OF OHIO )

Before me, the undersigned a Notary Public, in and for the State of Ohio, this 1st day of December, 1972, did personally appear a person known to me to be Gilbert H. Deitch and who is known to me to be Counsel for Plaintiff, Pursue, Ltd., and who, after being duly sworn, did depose and affirm that the allegations of the Complaint are true and correct to the best of his information, knowledge and belief.

(SD) GILBERT H. DEITCH
Gilbert H. Deitch

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., etc., | ) | |
| | ) | |
| Plaintiff, | ) | No. C-72-432 |
| | ) | |
| -vs- | ) | O R D E R |
| | ) | |
| LAWRENCE S. HUFFMAN, etc., et al., | ) | (Filed Dec. 1 |
| | ) | |
| Defendants. | ) | |

This cause came to be heard on plaintiff's motion for a temporary restraining order pursuant to Rule 65, Federal Rules of Civil Procedure.

The complaint filed herein attacks the constitutionality of Ohio Revised Code, § 3767.01, et seq. It appearing to the Court that the plaintiff has made an attempt to notify the defendants, argument was heard in an ex parte proceeding. To prevent great and immediate irreparable harm to the plaintiff, prior to the convening of a three-judge court in this matter, pursuant to 28 U.S.C. § 2284, it is

ORDERED that the judgment entry of the Allen County Common Pleas Court in Cause No. 72 CIV 0326, dated November 30, 1972, is hereby stayed except insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing.

(SD) NICHOLAS J. WALINSKI
Toledo, Ohio. UNITED STATES DISTRICT JUDGE

# APPENDIX K

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota, et al., Case No. 72 CIV 0326 (a Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theatre as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Dec. 4, 1972.....K3

IN THE COMMON PLEAS COURT OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| State ex rel Lawrence S. Huffman | : | CASE NO. 72 CIV 0326 |
| PLAINTIFF | : | MOTION |
| -vs- | : | |
| William H. Dakota, et al. | : | (Filed Dec. 4, |
| DEFENDANTS | | |

Plaintiff requests that the motion picture films located at the premises known as #69 Public Square, Lima, Ohio, the subject of this action, be viewed by the Court and that a judicial determination be made as to whether said films are or are not obscene.

Plaintiff further requests that upon a finding that said films are obscene, the Court order that said films not be exhibited at #69 Public Square, Lima, Ohio.

State ex rel Lawrence S. Huffman

By (SD) GARY R. HERMON
Attorney for Plaintiff

(Certificate of service omitted in printing.)

# APPENDIX L

William H. Dakota et al. v. State of Ohio, ex rel Lawrence S. Huffman, C72-445, (a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Petition for Removal, filed Dec. 11, 1972.....L3-7

Notice of Removal, filed Dec. 11, 1972.....L8

Motion to Remand, filed Dec. 18, 1972.....L9-10

Memorandum in Support of Motion to Remand (less Exhibits A-F) filed Dec. 18, 1972.....L11-16

First Motion for Immediate Hearing, filed Dec. 18, 1972, on Motion to Remand.....L17-21

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al, C72-432 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Order Designating Three Judge Court, filed Dec. 11, 1972.....L22-23

Order that Briefs be filed Jan. 15, 1973, filed Dec. 21, 1972..L24-25

Stipulation for Leave to Plead, filed Dec. 27, 1972.....L26

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

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|---|---|
| State of Ohio, ex rel Lawrence S. Huffman<br>Respondent<br>-vs-<br>William H. Dakota, et al<br>Petitioners | Civil Action No. C 72-445<br>PETITION FOR REMOVAL<br>(Filed Dec. 11, 1972) |

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION:

The Petition of William H. Dakota, et al shows:

1. An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff against William H. Dakota and Flora May Collins Moor, and Leland Samuel Collins, Sara Lee Collins and Pussycat Corporation and Cinema I Theatre, John Does and Jane Does, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein to-wit: two evidentiary hearings which resulted in temporary and permanent injunctions closing Petitioners' business.

2. The above-described action is a civil action which may be removed to this court by the Petitioners, Defendants there-

in, pursuant to the provisions of 28 U.S. C., Section 1443 in that Petitioners cannot enforce in the courts of the State of Ohio a right under Free Speech and Press Provisions of the Constitution of the State of Ohio in that

(a) Respondent-Plaintiff in the said state court action has brought a Petition to close Petitioners' business which is dissemination of sexually explicit materials which are presumptively protected under the First Amendment of the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only under controlled circumstances under which the materials are not thrust upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginzburg sense;

(b) Said Complaint of Respondent is based on the allegation in the Respondent's Complaint that the Cinema I Theatre operated by Petitioners herein William H. Dakota, et al at premises located at 69 Public Square, Lima, Ohio is a "nuisance."

3. Said action is also removable pursuant to the provisions of 28 U.S.C., Section 1443 in that

(a) Petitioners cannot enforce in the courts of the State of Ohio rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States to operate their business, which is the dissemination of sexually explicit materials which is presumptively protected under the First Amendment to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has in the recent past been utilized by the State of Ohio to curtail the exercise of First Amendment freedoms in the guise of abating a nuisance. There is every reason to believe that the procedures employed by Respondent herein acting by and through Prosecutor Lawrence S. Huffman of Allen County will be upheld by the Supreme Court of Ohio, although procedural safeguards to insure that materials entitled to the protection of the First Amendment to the Constitution of United States are not present in the Ohio Nuisance Statutes.

4. Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5. Petitioners show that local prejudices have been so inflamed by that court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First Amendment rights in the Court of Common Pleas of Allen County.

6. Said action is also removable pursuant to 28 U.S.C., Section 1441(b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treatises or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C., Section 1343 to

redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners reallege their allegations in paragraph 3 (a) and 3 (b) and paragraphs 4 and 5 and incorporate them as paragraph 6 (b) hereof.

7. Petitioners file herewith a bond with good and sufficient surety conditioned as provided by 28 U.S.C., Section 1446 (d) that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending against them in the Court of Common Pleas of Allen County, Docket number 72 Civ-0326 be removed to this court for the reasons set out hereinbefore.

Respectfully submitted,

(SD) TED IORIO
Ted Iorio

(SD) GILBERT DEITCH
Gilbert Deitch
Attorneys for Petitioners

STATE OF OHIO )
: SS:
COUNTY OF LUCAS )

I, Ted Iorio, have read the foregoing and say that the above is true as I

verily believe.

(SD) TED IORIO
Ted Iorio

(Jurat and Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

| | |
|---|---|
| State of Ohio, ex rel Lawrence S. Huffman<br>Respondent | Civil Action No. C 72 -445 |
| -vs- | NOTICE OF REMOVAL |
| William H. Dakota, et al<br>Petitioners | (Filed Dec. 11, 1 |

To: Robert H. Dunlap
Clerk of Courts
Allen County
Court House
Lima, Ohio

To: Lawrence S. Huffman, Prosecuting Attorney
127 N.Prospect Street
Lima,Ohio 45802

You, and each of you, are hereby notified that on the 11th day of December, 1972 William H. Dakota filed in the District Court for the Northern District of Ohio, Western Division a Petition for Removal of Cause No. 72-Civ-0326 in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff vs. William H. Dakota, et al, Defendants.

(SD) TED IORIO
Ted Iorio

Dated this 11th day of December, 1972

(Affidavit of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : |
| RESPONDENT | : CASE NO. C 72-445 |
| -vs- | : MOTION TO REMAND |
| WILLIAM H. DAKOTA, et al | : (Filed Dec. 18, 1972) |
| PETITIONERS | |

.. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1343; and

3. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of

the removal proceedings.

(SD) GARY R. HERMON
Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce St.
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | CASE NO. C 72-445 |
| RESPONDENT | |
| -vs- | MEMORANDUM IN SUPPORT OF MOTION TO REMAND (Filed Dec. 18, 1972) |
| WILLIAM H. DAKOTA et al | |
| PETITIONERS | |

.. .. .. .. .. .. .. .. .. .. ..

In their petition for removal, petitioners content that the suit initiated in the Court of Common Pleas of Allen County, Ohio, is a civil action which may be removed to a Federal District Court pursuant to 28 U.S.C. Sections 1441 (B) and 1443. With regard to petitioners' contention that 28 U.S.C. Section 1443 may be relied upon to remove the state action to the Federal District Court, the decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case #C72-28 in the United States District Court for the Northern District of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

The Court, beginning at page 6 of said opinion and order, discussed the question of Federal jurisdiction under 28 U.S.C. 1443 as it related to the removal of a state action brought under

chapter 3767 of the Ohio Revised Code to the Federal District Court. The Court specifically found that the state action could not be removed to the Federal District Court pursuant to 28 U.S.C. 1443. Additional discussion of this contention by the petitioners would seem to be unnecessary.

Petitioners attempt to invoke the provisions of 28 U.S.C. 1441 (B) which provides as follows:

> "Any civil action of which the District Courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

Petitioners contend that 28 U.S.C., Section 1343 specifically creates the original jurisdiction of the federal district court, thus, triggering the removable provisions of Section 1441 (B) at paragraph 6(A) of Petitioners' Petition for Removal -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitu-

tion of the United States."

Petitioners have carefully couched the above stated allegation in terms clearly intended to fit within the provisions of subparagraph (3) of Section 1343. Subparagraph (3) grants original jurisdiction to federal district courts of any civil action commenced "to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

To paraphrase petitioners' contention, it is claimed that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates petitioners' constitutional right of free speech. The record which is available to this Court reveals to the contrary.

Respondent filed a Complaint in the Common Pleas Court of Allen County, Ohio, alleging the existence of a public nuisance at the location known as #69 Public Square, Lima, Ohio; it was further alleged that the public nuisance was the continuous exhibition of obscene motion picture films at said location for which a preliminary and permanent injunction was sought by Respondent.

After an adversary hearing the Common Pleas Court of Allen County, Ohio, on October 24, 1972, issued a temporary injunction, a copy of said Order being attached hereto, marked Exhibit B, and incorporated

by reference.

On November 30, 1972, after a hearing, the Common Pleas Court granted a permanent injunction finding the obscene motion picture films had been continuously exhibited at #69 Public Square, Lima, Ohio, and, in accordance with the mandatory provisions of Section 3767.06 of the Revised Code of Ohio, ordered the premises in which the nuisance persisted closed for a period of one year unless the defendant-owners of the realty fulfilled the requirements provided in Revised Code Section 3767.04. A copy of the Court's order is attached hereto, marked Exhibit C and incorporated by reference.

On December 1, 1972, Judge Nicholas Walinski in Case No. C72-432 entitled Pursue Ltd. v. Lawrence S. Huffman, et al, in the United States District for the Western District of Ohio, Western Division, granted a temporary restraining order temporarily staying the Common Pleas Court order granted on November 30, 1972, except insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing. (A copy of the temporary restraining order is attached hereto, marked Exhibit D and incorporated by reference). In effect, the temporary restraining order temporarily modified the order of the State Court.

Respondent in a good faith attempt to comply with the federal court order filed on December 4, 1972, a motion in the state case requesting a prior adversary hearing, a copy of which is attached here-

to, marked Exhibit E and incorporated by reference. A similar motion was filed thereafter by Respondent which is, also, attached hereto, marked Exhibit F and incorporated by reference.

On December 11, 1972, the day prior to the hearing date set by the Allen County Common Pleas Court to view the motion picture films in a prior adversary hearing to determine whether said films were or were not obscene, Petitioners filed their Petition for Removal, thus, blocking the procedural vehicle deemed by this Court to be the proper method of enforcing the state court order.

Respondent submits that the Petition for Removal is really nothing more than a sham tactic designed to delay Respondent's efforts to abate the exhibition of obscene motion picture films as a public nuisance in the state court.

How can petitioners logically argue that enforcement of Chapter 3767 of the Ohio Revised Code, which has been unequivocally declared constitutional by this Court in Grove Press, Inc. v. Flask, 325 F. Supp. 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue Ltd. v. Lawrence S. Huffman, supra, is in violation of law and denies petitioners constitutional right of free speech. Indeed, if the Court is so inclined, Respondent challenges Petitioners to exhibit to this Court the motion picture films being exhibited at the premises enjoined so that this Court might determine whether said films are entitled to First Amendment protection.

## CONCLUSION

Petitioners have failed to allege any authority for the position that the State Civil action is an action removable under Federal law. The appropriate step to be taken by this Court would be to acknowledge that it does not have jurisdiction over this action pursuant to 28 U.S. C., sections 1441 or 1443; that defendants can effectively and adequately enforce their First Amendment rights to freedom of speech in the State Court action and, sua sponte, remand this civil action to the State Court, and since the removal was a wrongful order, defendants to pay the costs both in this Court and in the State Court.

Respectfully submitted,

(SD) GARY R. HERMON
Gary R. Hermon
Assistant Prosecuting Atty
127-129 North Pierce Street
P.O.Box 546, Lima, Ohio
45802
ATTORNEY FOR RESPONDENT

(Affidavit of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| Respondent | : | CASE NO. C 72-445 |
| -vs- | : | MOTION FOR |
| WILLIAM H. DAKOTA et al | : | IMMEDIATE HEARING ON MOTION TO REMAND. |
| Petitioners | : | (Filed Dec 18, 1972) |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondents respectfully move the Court pursuant to Rule 6(d) of the Federal Rules of Civil Procedure for an immediate hearing on defendants' motion to remand filed herein on or about December 18,1972, and for leave to serve a copy of his Motion to Remand and Notice of Hearing thereof within five days of the time specified for the hearing.

Good cause exists for this motion as is clearly set forth in the Memorandum in Support of this motion, attached hereto and made a part hereof.

Respectfully submitted,

_____

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

_____

Gary R. Hermon

Assistant Prosecuting
Attorney
Allen County, Ohio

ATTORNEYS FOR RESPONDENTS

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND.

This motion is being filed pursuant to Rule 6(d) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was scheduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had been scheduled in compliance with the Federal Court Order petitioners filed their petition for removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay respondent's efforts to abate the nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

In support of respondent's allegations, respondent refers to Exhibits A, B, and C attached to respondent's motions to dissolve temporary restraining order and to dismiss in Case No. C 72-432 in this Court which are hereby incorporated by reference. Said exhibits are affidavits of persons who have seen the motion pictures exhibited at the subject premises

for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of respondent's Motion to Remand.

The continuous exhibition of obscene motion picture films as evidenced by the aforementioned exhibits and petitioner's abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been used by petitioners, perhaps unwillingly, but by operation of the applicable federal statutes to effectively terminate the jurisdiction of the State Court thereby permitting the continuous commercial exploitation of sex at the subject premises under the pretense of freedom of expression. It would seem that the Court would welcome the opportunity to undo that which the operation of certain removal statutes dictate as the initial effect of filing a petition for removal, namely termination of State Court jurisdiction.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square Lima, Ohio, declared obscene and abated as

a public nuisance will be substantially prejudiced and a great injustice will result.

Respectfully submitted,

Lawrence S. Huffman, Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon, Assistant Prosecuting Attorney,
Allen County, Ohio
ATTORNEYS FOR RESPONDENT

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO

| | |
|---|---|
| PURSUE, LTD., a Delaware Corp., | No. C 72-432 |
| Plaintiff | Requesting Judge: Honorable Nicholas J. Walinski Northern District of Ohio |
| v. | |
| LAWRENCE S. HUFFMAN, etc., et al., | |
| Defendants | District Judge: Honorable Don J. Young Northern District of Ohio |
| (Filed Dec. 11, 1972) | Circuit Judge: Honorable Anthony J. Celebrezze |

Having been notified by the requesting judge shown above, that the complaint in the above entitled action is one required by an Act of Congress to be heard and determined by a District Court of three judges, I, Harry Phillips, Chief Judge of the Sixth Circuit, hereby designate the three judges named above to constitute the said Court and to hear and determine this action in accordance with 28 U.S.C. § 2284.

This designation and composition of the three judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three judge rather than a one judge court. This is a matter best determined by the three judge court.

Dated at Cincinnati, Ohio, this 6th day of December 1972.

(SD) HARRY PHILLIPS
CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., etc., | ) | |
| | ) | |
| Plaintiff, | ) | No. C 72-432 |
| | ) | |
| -vs- | ) | |
| | ) | O R D E R |
| LAWRENCE S. HUFFMAN, etc., et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | (Filed Dec. 21, 19 |

This cause came to be heard on a complaint filed pursuant to 42 U.S.C., § 1983, and 28 U.S.C., § 1343(3), (4); 28 U.S.C., §§ 2281 and 2284.

Having come to the attention of the Court that the parties have agreed that an amended complaint will be filed and that defendant shall have an extension of time until January 6, 1973, within which to file an answer to that pleading as amended, the time within which the answer is required pursuant to Rule 12(a), Federal Rules of Civil Procedure, is hereby extended to the above-mentioned date.

It appearing to the Court that expeditious handling of the instant suit requires the submission of opening briefs prior to convening a three-judge court, pursuant to 28 U.S.C., § 2284, it is

ORDERED that the parties herein file such briefs in support of their respective positions as they might deem helpful to

the Court in the consideration of this case. Said briefs to be filed on or before January 15, 1973.

(SD) NICHOLAS J. WALINSKI
UNITED STATES DISTRICT
JUDGE

Toledo, Ohio

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., a Delaware Corporation | CASE NO. C 72-432 |
| PLAINTIFF | STIPULATION FOR LEAVE TO PLEAD |
| -vs- | |
| LAWRENCE S. HUFFMAN et al | (Filed Dec. 27, 197 |
| DEFENDANT | |

.. .. .. .. .. .. .. .. .. .. ..

We, the attorneys for the respective parties, do hereby stipulate that the plaintiff may file an amended complaint instanter and that the defendants, Lawrence S. Huffman and Edward L. Fair may plead or move to the amended complaint on or before fourteen (14) days from the date of the filing of the same and that the Court may enter an Order accordingly; notice by the Clerk being hereby waived.

Approved:

(SD) NICHOLAS J. WALINSKI
U.S.District Judge

/S/ Ted Iorio per telephone agreement of 12/21/72
and
/S/ Gilbert H.Deitch per telephone agreement of 12/21/72
ATTORNEYS FOR PLAINTIFF

/S/ LAWRENCE S.HUFFMAN
Lawrence S. Huffman
ATTORNEY FOR DEFENDANTS, LAWRENCE S. HUFFMAN and EDWARD L. FAIR

# APPENDIX M

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al, C72-432 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Notice of Filing of Amendments, filed Dec. 29, 1972.....M3

Amendments to Complaint filed Dec. 29, 1972.....M4-7

Answer to Complaint and Amendments, filed Jan. 5, 1973 (Less Exhibit A).....M8-14

M-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., a Delaware Corporation | No. C 72-432 |
| - versus - | NOTICE |
| LAWRENCE S. HUFFMAN, et al | (Filed Dec. 29, 1972) |

PLEASE TAKE NOTICE, that the within is a copy of the Amendments to Complaint filed in this action as a matter of course, pursuant to Rule 15(a), Federal Rules of Civil Procedure, on the ___ day of December, 1972.

GILBERT H. DEITCH, Esquire
Suite 2005
One Hundred Colony Square
1175 Peachtree Street N.E.
Atlanta, Georgia, 30309
(404) 892-8890

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., a Delaware Corporation<br>Plaintiff<br><br>- versus -<br><br>LAWRENCE S. HUFFMAN, et al.<br><br>Defendants | No. C 72-432<br><br>AMENDMENTS TO COMPLAINT<br><br>(Filed Dec. 29, 1972) |

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, Plaintiff files herein the following amendments to its Complaint:

1. After Paragraph 2:

This is also a civil action whereby Plaintiff prays a judgment for money damages against said Defendants, jointly and severally, both in their official capacities and individually.

2. Add to Paragraph 3: and 42 U.S.C. Section 1985(3) which provides:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose

of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

3. Amend paragraph 10 to read:

10. Upon information and belief, Lawrence S. Huffman is named as a Defend-

ant individually and in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

4. Amend paragraph 11 to read:

11. Upon information and belief, Edward Fair is named as a Defendant individually and in his capacity as Sheriff of Allen County, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

5. Amend paragraph 12 to read:

12. The named Defendants, individually and in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgment, money damages and/or other order that may issue by this court.

6. Amend paragraph 13 to read:

13. The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law and customs within the City of Lima, Ohio, of bad-faith law enforcement, under facially invalid statutes and attempting the ultimate suppression of presumptively protected materials without, to this date, ever having had any judicial determination that

any of the materials disseminated by Plaintiff are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the unlawful activities, as well as other unconstitutional conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the City of Lima and the State of Ohio, and of the other forty-nine states who may visit Ohio and who wish to exercise their First Amendment right to view non-obscene films.

7. After paragraph 19 add the following paragraph:

On December 1, 1972 after this Court issued a restraining order at approximate- 3:00 p.m., Defendants continued their harassment of Plaintiff by serving subpoenas duces tecum upon the management of Cinema I Theatre in the case of Huffman v. Dakota, after the final judgment had been entered, to produce all the films in the possession of management of Cinema I Theatre.

8. After paragraph 4 of the prayer for relief, add the following paragraph:

That judgment be rendered herein for damages in favor of Plaintiff against Defendants, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00).

(Ctf. of Service omitted in printing.)

GILBERT H. DEITCH, Esquire
(Address omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation : CASE NO. C 72-432

PLAINTIFF :

-vs- : ANSWER

LAWRENCE S. HUFFMAN, et al : (Filed Jan. 5, 1973)

DEFENDANTS :

.. .. .. .. .. .. .. .. .. .. ..

For their answer to plaintiff's complaint and amendments to complaint, defendants, Lawrence S. Huffman and Edward Fair,

FIRST DEFENSE

1. Deny paragraphs 1 to 7 of plaintiff's complaint and amendments to complaint and specifically deny the jurisdictional allegations alleged by plaintiff.

2. Deny that part of paragraph 8 of plaintiff's complaint and amendments to complaint alleging that plaintiff, Pursue, Ltd., is engaged through its agents, servants and employees in the dissemination of movies for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; deny that said movies are presumptively protected under the First Amendment to the Constitution of the United States; and allege that said movies are obscene.

3. Deny paragraph 9 of plaintiff's complaint and amendments to complaint; allege that the materials disseminated are obscene.

4. Admit that part of paragraph 10 of plaintiff's complaint, and amendments to the complaint, alleging that Lawrence S. Huffman is prosecuting attorney of Allen County, Ohio, and authorized under Ohio law to act on behalf of the State of Ohio to abate a nuisance pursuant to Chapter 3767 of the Revised Code of Ohio; and denies each and every other allegation contained in said paragraph 10.

5. Admit that part of paragraph 11 of plaintiff's complaint and amendments to the complaint, alleging that Edward Fair is Sheriff of Allen County, Ohio; and denies each and every other allegation contained in said paragraph 11.

6. Deny paragraph 12 of plaintiff's complaint and amendments to the complaint.

7. Deny paragraph 13 of plaintiff's complaint and amendments to the complaint and allege that plaintiff has been and is exhibiting obscene motion picture films in Lima, Ohio, which are not entitled to First Amendment protection and, further, that acts of the defendants intended to enforce state law, to wit: Ohio Revised Code Section 3767.01 et seq., were done in reliance on decisions of the United States District Court, Northern Division, namely, Grove Press, Inc., v. Flask, 326 F Supp 574, and Marks v. Huffman et al., Case No. C 72-193, specifically finding Ohio Revised Code Sections 3767.01 et seq.,

constitutional, and in compliance with the temporary restraining order issued by this Court herein.

8. Move to strike paragraph 14 in its entirety for the reason that the plaintiff in William Dakota v. Sheriff Edward Fair, Docket No. C 72-384, United States District Court, Northern Division, is not a party herein, and further, that any claim of an infringement of the constitutional rights of plaintiff William Dakota is a personal right and therefore, neither transferable or assignable; defendants, in the alternative, deny each and every allegation contained in said complaint and amendments to the complaint.

9. Deny paragraph 15 of plaintiff's complaint and amendments to the complaint, for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; and specifically deny that the personal constitutional rights of William Dakota are assignable.

10. Deny paragraph 16 of plaintiff's complaint and amendments to the complaint for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments.

11. Admit paragraph 17 of plaintiff's complaint and amendments to the complaint.

12. Admit paragraph 18 of the plaintiff's complaint and amendments to the complaint.

13. Deny paragraph 19 of plaintiff's complaint and amendments to the complaint,

and allege that the Honorable Judge Robert M. Light did in Case No. 72 CIV 0326 in the Court of Common Pleas of Allen County, Ohio, entitled The State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, on November 30, 1972, issue the order marked Exhibit A and attached to plaintiff's complaint; that said order contained specific findings that the continuous exhibition of obscene motion picture films constituted a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code; that the defendants named therein and all of the persons acting in concert or participation with them "were permanently enjoined and restrained from conducting such nuisance; that several of the defendants named therein together with plaintiff in this action through its agents, servants, and employees, did violate the order of the state court by continuing to exhibit obscene motion picture films; and that in compliance with the order of this Court requiring a prior adversary hearing issued by way of a temporary restraining order herein on December 1, 1972, plaintiff, Lawrence S. Huffman, did on December 1, 1972, cause a subpoena duces tecum to be issued and served upon Robert Smith, a defendant in the State case, and Robert Hollis, a person acting in concert or participation with said Robert Smith, requiring production and exhibition of motion picture films in their possession for the purpose of conducting a prior adversary hearing, all in a good faith attempt to enforce the injunction issued by the State court in State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al.

14. Deny paragraph 20 of plaintiff's complaint and allege that "materials" alleged to be protected under the First Amendment are, in fact, obscene motion picture films not entitled to First Amendment protection, and further allege that the plaintiff which purports to be a corporation is not entitled to invoke protection under the First Amendment for the reason that the right of free speech is a personal right and not available to a corporation.

15. Deny paragraph 21 of plaintiff's complaint and amendments to the complaint, and allege that all acts of defendants have been in good faith and in reliance upon the decisions of the United States District Court, Northern Division, upholding the constitutionality of Section 3767 et seq., of the Ohio Revised Code, as set forth in paragraph 7 of defendant's answer herein, and in compliance with the temporary restraining order of this Court requiring a prior adversary hearing; that on December 4, 1972, the Court of Common Pleas of Allen County, Ohio, viewed the motion picture "Sexual Freedom in Denmark" but that the Court withheld making a judicial determination as to obscenity at the request of Ted Iorio, counsel for plaintiff herein, so that said counsel could present additional evidence relative to the issue of the obscenity of said film; that the Court of Common Pleas of Allen County, Ohio, withheld its decision until December 12, 1972, at which time the prior adversary hearing was to be reconvened; that on December 11, 1972, the day prior to the reconvening of the prior adversary hearing in the Allen County Common Pleas Court, Ted Iorio and Gilbert Deitch, at-

torneys for plaintiff herein, filed in this Court in Case No. C 72-445 entitled State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al., a petition for removal effectively terminating the jurisdiction of the Court of Common Pleas of Allen County, Ohio, in the same entitled case and in which the prior adversary hearing had been scheduled; that counsel for the plaintiffs have intentionally and wrongfully used the federal judicial process to avoid any judicial determination as to obscenity of the films by the state court; that if there is any infringement of plaintiff's First Amendment rights arising out of the lack of any final judicial determination as to the obscenity of motion picture films, it resulted from the acts and conduct of plaintiff's counsel rather than any conduct of defendants herein; and that plaintiff's First Amendment rights are not being violated for the reason that the motion pictures exhibited by plaintiff are obscene and, further, that plaintiff, in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment.

16. Deny paragraphs 22-26 of plaintiff's complaint and amendments to the complaint, and allege that plaintiff in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment, that the motion picture films exhibited by plaintiff are obscene and, thus, not entitled to First Amendment protection; that the Ohio Nuisance Statutes, Section 3767.01 et seq., of the Ohio Revised Code are constitutional; and that any lawful act

in furtherance of the enforcement of said Ohio Nuisance Statutes, which have been held constitutional by this Court and in compliance with the temporary restraining order issued herein cannot be deemed violative of plaintiff's constitutional rights.

SECOND DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Move to dismiss plaintiff's complaint and amendments to the complaint for failure to state a claim upon which relief can be granted.

THIRD DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Allege that any acts or conduct of defendants directed at plaintiff or its agents were in good faith and in the exercise of their offices.

Respectfully submitted,

(SD) LAWRENSE S. HUFFMAN
Lawrense S. Huffman
Prosecuting Attorney
ATTORNEY FOR DEFENDANTS
LAWRENCE S. HUFFMAN AND
EDWARD L. FAIR

(Certificate of Service omitted in printing.)

## APPENDIX N

Trial Brief of Defendants Huffman et al. in Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al, C72-432 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Point Number 3 of Trial Brief, filed Jan. 16, 1973.....N3-8

Affidavits of Deputy Sheriff Hawk (Incorporated in Trial Brief) Re Viewing of "Skin Flick Madness" and "Okie Maid" on Dec. 7, 1972.....N9

Re Viewing of "The Honeymoon Is Over" and "Brit Blazer" on Dec. 14, 1972.....N10

Re Viewing of "Bells, Books and Balls" and "Mother Knows Best" on Dec. 30, 1972..... N11

Re Viewing of "The Hedonist-Hypnotist" and "Documentary of a Madam" on Jan. 10, 1972..... N12

An assignment of the lease may transfer the lessee's entire interest in the demised premises for the unexpired term of the original lease to the assignee, but, clearly, the personal right of the lessee to freedom of speech is a constitutional right, and thus, non-assignable. The constitutional rights claimed to be infringed upon, therefore, must be those of the assignee-plaintiff, Pursue, Ltd., and not that of the assignor-lessee, William H. Dakota.

Defendant contends that Pursue, Ltd., which represents itself to be a Delaware Corporation is not a "person" within the meaning of that term as used in the Fourteenth Amendment. The Fourteenth Amendment provides in part that no State shall deprive "any person of life, liberty, or property, without due process of law." In Northwestern National Life Insurance Co. v. Riggs, 203 US 243, 27 S.Ct. 126 (1906) the Supreme Court held that corporations cannot be deprived of "liberty" under the Fourteenth Amendment but that the term "liberty" applied to natural persons only. Even if "person" could be construed to include corporations, defendants contend that Sections 3767.01 et seq., of the Ohio Revised Code provide procedural devices which were available to plaintiff in the State court on the date of the alleged assignment and are still available to litigate those questions raised in this suit. Plaintiff's claim, therefore, that its liberty has been deprived without due process of law is without merit.

POINT NUMBER THREE

Defendants contend that plaintiff

must establish that defendants' attempts to enforce Sections 3767.01 et seq., of the Ohio Revised Code are (1) in bad faith, (2) harassment, and (3) cause great and immediate irreparable injury.

Even if Sections 3767.01 et seq., of the Ohio Revised Code were unconstitutional on their face, the Supreme Court has consistently held, as recently as February, 1971, that "possible unconstitutionality of a statute on 'its face' does not of itself justify injunction against good faith attempts to enforce it" absent bad faith, harassment, great and immediate irreparable injury, or other extraordinary circumstances. Younger v. Harris, 91 S. Ct. 746, 755.

Defendants contend that the nuisance suit was initiated in the State Court in reliance upon the decisions of the United States District Court, Northern District in Grove Press, Inc. v. Flask, 326 F.Supp 574, and Marks v. Huffman, et al, Case C 72-193 (See Appendices O and P) upholding the constitutionality of said statutes; that enforcement of the State Court's orders issued in the state nuisance action was in good faith and in reliance upon the constitutionality of the statutory procedures of said statutes; and that when ordered by the Federal District Court to provide prior adversary hearings to determine the obscenity of motion picture films at the Cinema I Theater, defendant, Lawrence S. Huffman, did in good faith, attempt to comply with said federal court order and still enforce the state court order by requesting such an adversary proceeding. Plaintiff cannot prove, as no such proof exists, that defendants ever

prosecuted the state action in bad faith with no expectation of obtaining a valid conviction.

The "harassment" element as envisioned by the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, is totally absent in this cause.

The evidence will demonstate: (1) that defendants have not "harassed" plaintiff or its agents within the meaning of that term as enunciated by the Court in Dombrowski v. Pfister, 380 U.S. 479, supra, and later cases; (2) that defendants have not undertaken civil and criminal prosecution against plaintiff and his agents "in bad faith and without hope of obtaining a valid conviction"; (3) that plaintiff has not suffered "great and immediate irreparable injury" as envisioned by the Court in Younger v. Harris, supra, and other pertinent Supreme Court decisions.

Dombrowski, supra, presented the Court with a factual pattern of a continuous series of physical acts and threats committed by state officials against the plaintiffs therein. This continuous pattern of acts and threats became the framework of the "harassment" requirement for federal intervention under the Civil Rights Act where the "harassment" was designed not for good faith prosecution with an expectancy of conviction, but in "bad faith and without hope of obtaining a valid conviction" in the State court.

In Dombrowski, supra, notwithstanding a state court order quashing warrants and suppressing evidence, plaintiffs offered

to prove threats of additional prosecution under the same statute by the State obtaining indictments using copies of the illegally seized evidence and conducting public hearings at which copies of the illegally seized documents were used.

In the present case defendants believe the evidence will show that no conditions exist whatsoever from which one might infer that defendants did not expect a valid conviction. None of the elements present in Dombrowski, supra, or even analagous elements can be found in this case.

In order for plaintiff to prevail herein plaintiff must establish that the danger of irreparable injury is both great and immediate. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.714; Younger v. Harris, supra.

"Certain types of injury in particular, the cost, anxiety, and inconvenience of having to defend against a single prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by defense against a single criminal prosecution." Younger v. Harris, supra, p. 751.

Plaintiff will undoubtedly argue that a substantial loss of or impairment of freedom of expression will occur if the state court order is not dissolved or modified to the extent that enforcement of state court's order is unenforceable, and

this loss or impairment of freedom of expression is his irreparable injury.

A close examination of the facts of the present case, however, reveal to the contrary. In Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L. Ed.2d 1498 (1957), the Supreme Court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press." Clearly, Roth remains the law of the land. Therefore, if the films exhibited at the Cinema I Theater by plaintiff are obscene, plaintiff cannot claim either a loss or impairment of freedom of expression as irreparable injury since obscenity is not within the area of constitutionally protected expression.

Attached hereto as Appendices Q, R, S and T are affidavits of a deputy sheriff who has viewed motion picture films exhibited by plaintiff since this Court ordered the re-opening of the Cinema I Theater.

The attached affidavits clearly show that plaintiff has continuously exhibited obscene motion picture films at the location already deemed a public nuisance by the State court.

Plaintiff has filed a spurious lawsuit in the federal district court without pursuing any remedy available in the State court for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition. Defendants contend that plaintiff's conduct is a flagrant abuse of the federal court system.

POINT NUMBER FOUR

Defendant Lawrence S. Huffman contends that plaintiff's complaint and amendments to the complaint do not state a cause of action upon which relief can be granted for the reason that defendant is immune from suit as a matter of law by reason of his position as prosecuting attorney of Allen County, Ohio, and the quasi-judicial nature of his acts.

This question was squarely placed before this Court in Robert Boyd v. Lawrence S. Huffman, et al. in Civil No. C 70-296. In that case the prosecuting attorney prepared and assisted in the execution of a search warrant which resulted in the seizure of an obscene motion picture film without first conducting a prior adversary hearing as to the film's obscenity. Judge William J. Young's opinion is attached hereto as Appendix U. At page 3 of his opinion Judge Young stated: "It has long been recognized in this Circuit that a prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action as that which protects a judge acting within his jurisdiction.

# A F F I D A V I T

STATE OF OHIO SS:
COUNTY OF ALLEN

FRED H. HAWK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on December 7, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Skin Flick Madness" and "Okie Maid".

Affiant says that the credits of "Skin Flick Madness" showed that it was produced by "Suckit Films"; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the various sexual acts depicted in the stag film and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

Affiant says that the second feature was entitled "Okie Maid" which lasted approximately 50 minutes; that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

Further affiant saith not.

(SD) FRED H. HAWK

(Jurat omitted in printing.)

# A F F I D A V I T

STATE OF OHIO
COUNTY OF ALLEN SS:

FRED H. HAWK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on December 14, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio; and that he viewed two motion pictures entitled "The Honeymoon Is Over" and "Brit Blazer".

Affiant says that the first feature he viewed was entitled "The Honeymoon Is Over" which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism and fellatio.

Affiant further says that he viewed the second motion picture entitled "Brit Blazer" which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

Further affiant saith not.

(SD) FRED H. HAWK

(Jurat omitted in printing.)

# A F F I D A V I T

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HAWK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on December 30, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio; and that he viewed two motion pictures entitled "Bells, Books and Balls" and "Mother Knows Best".

Affiant says that the first feature he viewed was entitled "Bells, Books and Balls" which lasted approximately one hour; that there was no general theme of the movie ascertainable by affiant; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

Affiant says that he viewed the second feature entitled "Mother Knows Best" which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter travelling to the west coast; that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

Further affiant saith not.

(SD) FRED H. HAWK

(Jurat omitted in printing.)

# A F F I D A V I T

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HAWK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio; and that he viewed two motion picture films entitled "The Hedonist-Hypnotist" and "Documentary of a Madam".

Affiant says that the first motion picture he viewed was entitled "The Hedonist-Hypnotist" which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

Affiant says that he viewed the second feature entitled "Documentary of a Madam" which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

Further affiant saith not.

(SD) FRED H. HAWK

(Jurat omitted in printing.)

# APPENDIX O

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio, et al. C72-432 (a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Motions to Dissolve Temporary Restraining Order and to Dismiss, filed Feb. 12, 1973..... O3-4

Memorandum in Support of Motions to Dismiss and Dissolve T.R.O. (Less Exhibits A, B, and C) which appear at Appendices P, Q, and R) filed Feb. 12, 1973..... O5-10

Motion for Immediate Hearing..... O11-12

Memorandum in Support of Motion for Immediate Hearing, filed Feb. 12, 1973..... O13-16

William H. Dakota v. Huffman, et al. C72-445 (a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Second Motion for Immediate Hearing filed on Feb. 12, 1973 on Motion to Remand, filed Dec.18, 1972. O17-21

Additional Memorandum, filed Mar. 12, 1973, in Support of Motion to Remand..... O22-34

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., et al. | : | CASE NO. C 72-432 |
| Plaintiff | : | |
| -vs- | : | MOTIONS TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS. |
| LAWRENCE S. HUFFMAN, et al | : | (Filed Feb. 12, 1973) |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. ..

Defendants, Lawrence S. Huffman and Edward L. Fair, move the Court for an order dissolving the Temporary Restraining Order issued hereon on December 1, 1972, for the reason that the Temporary Restraining Order was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law, and further, for the reason that Plaintiff cannot show that a state court order prohibiting exhibition of motion pictures at the premises known as Cinema I Theatre, #69 Public Square, Lima, Ohio, causes great and immediate irreparable injury, loss or damage to plaintiff as evidenced by the attached affidavits and time-motion studies in Defendants' Memorandum.

Defendants, Lawrence S. Huffman and Edward L. Fair, further move the Court for an Order dismissing Plaintiff's Complaint for the reason that it is a sham pleading brought in bad faith and to permit further cognizance thereof would only perpetuate the fraud already thrust upon the Court by Plaintiff and the resultant gross abuse of

the federal judicial process, all as evidenced by the attached exhibits in Defendants' Memorandum.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney,
Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting
Attorney

ATTORNEYS FOR DEFENDANTS,
LAWRENCE S. HUFFMAN AND
EDWARD L. FAIR

M E M O R A N D U M

Defendants contend the temporary restraining order issued herein on December 1, 1972, should be dissolved for the reason that it was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law.

Rule 65(b) of the Federal Rules of Civil Procedure provides in part: "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

Clearly, the temporary restraining order issued herein was without notice, indeed, the order states "that the plaintiff has made an attempt (my emphasis) to notify the defendants." As a matter of fact, when defendants were notified that suit had been filed against them, Gary R. Hermon, one of the counsel for defendants, called the Court and spoke to one of the law clerks of the Court. At that time counsel specifically requested that he be notified as he wished to appear if the Court was going to consider plaintiff's application for a temporary restraining order. Counsel was informed that he would be so notified; counsel for defendants learned days later that the order had been issued ex parte and he did not receive notice.

The record shows that over 60 days have elapsed since issuance of said order. The record further shows the order has not been extended nor have defendants consented to any extension thereof.

Defendants are entitled to dissolution of the temporary restraining order on this basis alone.

Further, the basis for the issuance of said order, to wit: "to prevent great and immediate irreparable harm to the plaintiff" as alleged by plaintiff was false and fradulent. Attached hereto and incorporated by reference are Exhibits A, B, and C which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the Cinema I Theatre, #69 Public Square, Lima, Ohio, for three successive weeks, January 10 - 30, 1973, together with photographic reductions of time-motion studies of said motion picture films. (Taped recordings have been made of said films and will be available at the hearing of defendants' motions.) (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's office, having been previously filed herein.)

The gist of plaintiff's contention that plaintiff would sustain great and immediate irreparable harm was that defendants would actively seek through the state court to interfere with the exhibitions of "constitutionally protected" motion picture films at the Cinema I Theatre.

Plaintiff's representations to the Court were false and fraudulent as evidenced by the attached exhibits. Plaintiff has consistently and continuously exhibited obscene motion picture films at said theatre, therefore, plaintiff cannot sustain the great and immediate irreparable injury which must be the basis of the temporary restraining order as obscenity is not constitutionally protected. Since plaintiff cannot suffer the requisite injury, plaintiff cannot be entitled to the relief sought and the temporary restraining order must be dissolved.

Defendants further contend that this Court can and should dismiss plaintiff's complaint for the reason that it is a sham pleading brought in bad faith; that it is a fraudulent action which, when combined with the petition for removal filed with this Court in Case No. C 72-445, constitutes a gross abuse by plaintiff of the federal judicial process.

"A sham pleading is defined as that while in good form is false in fact, or one good in form but false in fact and not pleaded in good faith." 61 Am. Jur 2d Pleading, Section 26, page 474.

"It has always been held that by virtue of its inherent power, the court has authority by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action or defenses that are sham, frivolous, or wholly vexations." 61 Am Jur 2d, Pleading, Section 211, page 631.

As related earlier in this Memorandum, plaintiff's basis for obtaining a temporary restraining order, indeed, the basis for the entire lawsuit is that defendants have in the past and will continue in the future to interfere with the presentation of "constitutionally protected" motion picture films at the Cinema I Theatre, #69 Public Square, Lima, Ohio, by plaintiff. While plaintiff's complaint is "in good form", it is "false in fact" as evidenced by Exhibits A, B, and C. Plaintiff has used the federal judicial process fraudulently (1) by filing a complaint claiming that it was exhibiting "constitutionally protected" films; (2) by obtaining a temporary restraining order on the same basis and falsely representing a fear of great and immediate irreparable harm which, of course, can't be sustained since the films are obscene; and (3) by filing a sham petition for removal in this Court in Case No. C 72-445 thereby terminating the jurisdiction of the state court when defendant Huffman attempted to comply with this Court's order and afford plaintiff a prior adversary hearing as to obscenity.

Plaintiff's complaint was not brought in good faith as evidenced by the continuous exhibition of obscene films and the filing of the petition for removal one day before the prior adversary hearing to determine obscenity in the state court under the guidelines of the federal order.

Defendants need not dwell upon the obscenity of the motion picture films exhibited by plaintiff at the subject premises. Exhibits A, B, and C speak for themselves. The depths to which the porno-

graphy peddlers like plaintiff have fallen in the area of obscene motion pictures is perhaps best illustrated by the language used by the Court of Appeals for Lucas County in State ex rel Ewing v. "Without A Stitch", 28 O App 2d 107 at page 112:

> "By any test, medium core, hard core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film (Without A Stitch) was obscene."

The film "Without a Stitch" couldn't qualify as a cartoon at the Cinema I Theatre where plaintiff daily exhibits obscene films many times over more sexually explicit.

To permit plaintiff to persist in such conduct, and more importantly, to abuse the federal judicial process in the manner above described, while it continues to commercially exploit sex under the pretense of freedom of expression would be contrary to law, an injustice to the people of the State of Ohio in whose name the state action was brought, and a reward to those who clearly are violating the law and knowingly abusing the federal court system for so doing.

Plaintiff's suit is a sham as demonstrated by its conduct, and, accordingly, should be dismissed.

Respectfully submitted,

Lawrence S. Huffman

Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
45802
Telephone: (419) 229-0786

and

Gary R. Hermon
Assistant Prosecuting
Attorney
Allen County, Ohio

ATTORNEYS FOR DEFENDANTS
LAWRENCE S. HUFFMAN and
EDWARD L. FAIR

(Certificate of Service
omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., | |
| Plaintiff | CASE NO. C 72-432 |
| -vs- | MOTION FOR IMMEDIATE HEARING ON MOTIONS TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS. |
| LAWRENCE S. HUFFMAN et al | |
| Defendants | (Filed Feb 12, 1973) |

Defendants respectfully move the court pursuant to Rule 6(d) of the Federal Rules of Civil Procedure for an immediate hearing on defendants' motions to dissolve temporary restraining order and to dismiss which are filed herewith and for leave to serve a copy of said motions and a notice of the hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this motion as is clearly set forth in the Memorandum in support of this motion, attached hereto and made a part hereof.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce St.
P.O. Box 546, Lima, Ohio
45802
Telephone:(419) 229-0786
and

Gary R. Hermon
Assistant Prosecuting
Attorney
Allen County, Ohio

ATTORNEYS FOR DEFENDANTS

M E M O R A N D U M

This motion is being filed pursuant to Rule 6(d) of the Federal Rules of Civil Procedure, which provides, in material part, as follows:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order for cause shown shall be made on ex parte application . . . ."

On November 30, 1972, after two prior adversary hearings the Allen County Court of Common Pleas issued a permanent injunction and, having made a finding that a nuisance existed at the premises located at #69 Public Square, Lima, Ohio, ordered said premises closed as required by the pertinent Ohio statutes.

On December 1, 1972, plaintiff filed his complaint herein and obtained without notice an ex parte a temporary restraining order. Plaintiff's suit was predicated upon a contention that enforcement of the state court's order effectively curtailed plaintiff's First Amendment rights, and that by reason thereof, plaintiff sustained great and immediate irreparable injury.

Defendants represent to this Court that plaintiff has used the Court to its own ends and has falsely and fradulently

filed its Complaint, obtained a temporary restraining order, and filed a petition for removal for the sole purpose of commercially exploiting the dominant sexual theme of motion pictures exhibited by plaintiff in the subject premises, to the great and immediate irreparable harm to the citizens of the State of Ohio in whose name defendant Huffman brought the State action.

In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B, and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).

Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been placed in a position of making an order based upon a contention of

great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff.

To permit plaintiff to persist in such conduct is to reward an entity commercially exploiting sex under the pretense of freedom of expression and, at the same time, punish the people of the State of Ohio by thwarting good faith State prosecution under the Ohio nuisance statutes brought on behalf of the people of the State of Ohio.

Defendants submit that plaintiff's complaint and the subsequent petition for removal filed in this Court are really nothing more than a sham tactic designed to delay and, hopefully, destroy defendants' efforts to abate the nuisance at the Cinema I Theatre, #69 Public Square, Lima, Ohio, said location having been previously adjudicated a nuisance after prior adversary proceedings and continuing to be a nuisance by virtue of the sham actions brought by plaintiff in this Court.

Defendants further submit that time is of the essence as plaintiff persists in exhibiting obscene motion pictures at the subject premises, and that unless this Court orders an immediate hearing on defendants' motions to dissolve temporary restraining order and to dismiss, defendants' rights to proceed in the State Court and insure abatement of the subject premises as a public nuisance will be substantially prejudiced and a great injustice

will thereby result.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting
Attorney
Allen County, Ohio

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : |
| | : CASE No. C 72-445 |
| Respondent | |
| | : MOTION FOR IMMEDIATE HEARING |
| -vs- | : ON MOTION TO REMAND. |
| WILLIAM H. DAKOTA et al | : (Filed Feb. 12, 1973) |
| Petitioners | : |

.. .. .. .. .. .. .. .. .. .. ..

Respondents respectfully move the Court pursuant to Rule 6(d) of the Federal Rules of Civil Procedure for an immediate hearing on defendants' motion to remand filed herein on or about December 18, 1972, and for leave to serve a copy of his Motion to Remand and Notice of the Hearing thereof within five days of the time specified for the hearing.

Good cause exists for this motion as is clearly set forth in the Memorandum in Support of this motion, attached hereto and made a part hereof.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon
Ass't Prosecuting Attorney
ATTORNEYS FOR RESPONDENTS

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND.

This motion is being filed pursuant to Rule 6(d) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said loca-

tion.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was scheduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had been scheduled in compliance with the Federal Court Order petitioners filed their petition for removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay respondent's efforts to abate the nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

In support of respondent's allegations respondent refers to Exhibits A, B, and C attached to respondent's motions to dissolve temporary restraining order and to dismiss in Case No. C 72-432 in this Court which are hereby incorporated by reference. Said exhibits are affidavits of persons who have seen the motion pictures exhibited at the subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of respondent's Motion

to Remand.

The continuous exhibition of obscene motion picture films as evidenced by the aforementioned exhibits and petitioner's abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been used by petitioners, perhaps unwillingly, but by operation of the applicable federal statutes to effectively terminate the jurisdiction of the State Court thereby permitting the continuous commercial exploitation of sex at the subject premises under the pretense of freedom of expression. It would seem that the Court would welcome the opportunity to undo that which the operation of certain removal statutes dictate as the initial effect of filing a petition for removal, namely termination of State Court jurisdiction.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Respectfully submitted,

Lawrence S. Huffman, Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon, Assistant
Prosecuting Attorney,
Allen County, Ohio
ATTORNEYS FOR RESPONDENT

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| THE STATE OF OHIO ex rel : | |
| | CASE NO. |
| RESPONDENT : | C72-445 |
| -vs- : | ADDITIONAL MEMORANDUM IN |
| WILLIAM H. DAKOTA et al : | SUPPORT OF MOTION TO |
| PETITIONERS : | REMAND. |
| | (Filed Mar. 12, 197 |

.. .. .. .. .. .. .. .. .. .. ..

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S. C., Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (b).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al. in Case #C72-26 in this United States Dis-

trict of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films at the local exhibitors choose. They contend that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners or exhibitors first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443

reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and diversion embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (Emphasis added)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Raines v. Denville, 357 F 2d 756 (4th Cir., 1966).

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 384 U. S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

> 1. that the right . . . is a right under any law providing for . . . equal civil rights, and
>
> 2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F.2d 595 (7th Circ.,1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . . .
>
> "On the basis of ths historical material that is available, we conclude that the phrase 'any law providing for . . . equal

civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality, Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (Citation omitted). (Em-

phasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443 (1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendants are not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogus is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F.2d 1067, 1070 (4th Cir. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious

that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) was that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex

rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441:

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of

their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiff's action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F.Supp. 281, at 292, and 28 U.S.C. Section 1441(B):

> ". . . The City derives its authority to seek an injunction against his 'nuisance' not from Federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens . . . ."

And in the Grove Press, Inc. case, the Court also stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I Am Curious -- Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that

removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.

"The City's prayer for an injunction in the state courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this 'nuisanse' not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment

defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc. v. Prince George County Cong. of Racial Eq., 221 F. Supp 541, 544 (D Md., 1963) . . . .

"Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal

judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc. v. Flask, 325 F. Supp. 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffman, Case No. C72-432.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
45802
ATTORNEY FOR RESPONDENT

# Appendix P


| | Page |
|---|---|
| Affidavit of Fred Hawk. . . . . | 2-3 |
| Time Motion Study of Films "Documentary of A Madam" and "Hedonist Hypnotist" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432. . . . . | 4-39 |

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff of Allen County, Ohio; that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Documentary of a Madam" and "The Hedonist Hypnotist".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motinn picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

| | | |
|---|---|---|
| 1. | at photograph 103 | fellatio |
| 2. | at photograph 105 | sexual intercourse |
| 3. | at photographs 113-114 | fellatio |
| 4. | at photographs 116-135 | sexual intercourse |
| 5. | at photographs 147-154 | fellatio |
| 6. | at photographs 157-184 | sexual intercourse, group sex, lesbianism |

| | | |
|---|---|---|
| 7. | at photographs 235-241 | fellatio, group sex |
| 8. | at photographs 250-282 | fellatio |
| 9. | at photographs 254-278 | cunnilingus |
| 10. | at photographs 280-289 | cunnilingus |
| 11. | at photographs 284-292 | sexual intercourse |
| 12. | at photographs 295-307 | sexual intercourse |
| 13. | at photographs 322-323 | sexual intercourse |
| 14. | at photographs 350-381 | masochism |
| 15. | at photographs 390-449 | sadism |
| 16. | at photographs 458-461 | cunnilingus |
| 17. | at photographs 465-472 | sexual intercourse |
| 18. | at photograph 475 | cunnilingus |
| 19 | at photographs 476-489 | sexual intercourse |
| 20. | at photographs 502-602 | lesbianism |
| 21. | at photographs 536-551 | cunnilingus |
| 22. | at photographs 571-578 | female masturbating another female with electric vibrator |
| 23. | at photographs 585-597 | female having "intercourse" with another female with dildo |
| 24. | at photographs 827-844 | sexual intercourse |
| 25. | at photographs 859-933 | lesbianism |
| 26. | at photographs 905-912 | cunnilingus |
| 27. | at photographs 926-932 | cunnilingus |
| 28. | at photographs 955-976 | female masturbation |
| 29. | at photographs 1084-1095 | sexual intercourse |
| 30. | at photographs 1107-1139 | lesbianism |
| 31. | at photographs 1134 | cunnilingus |
| 32. | at photographs 1154-1202 | group sex |

Further affiant saith not.

_____

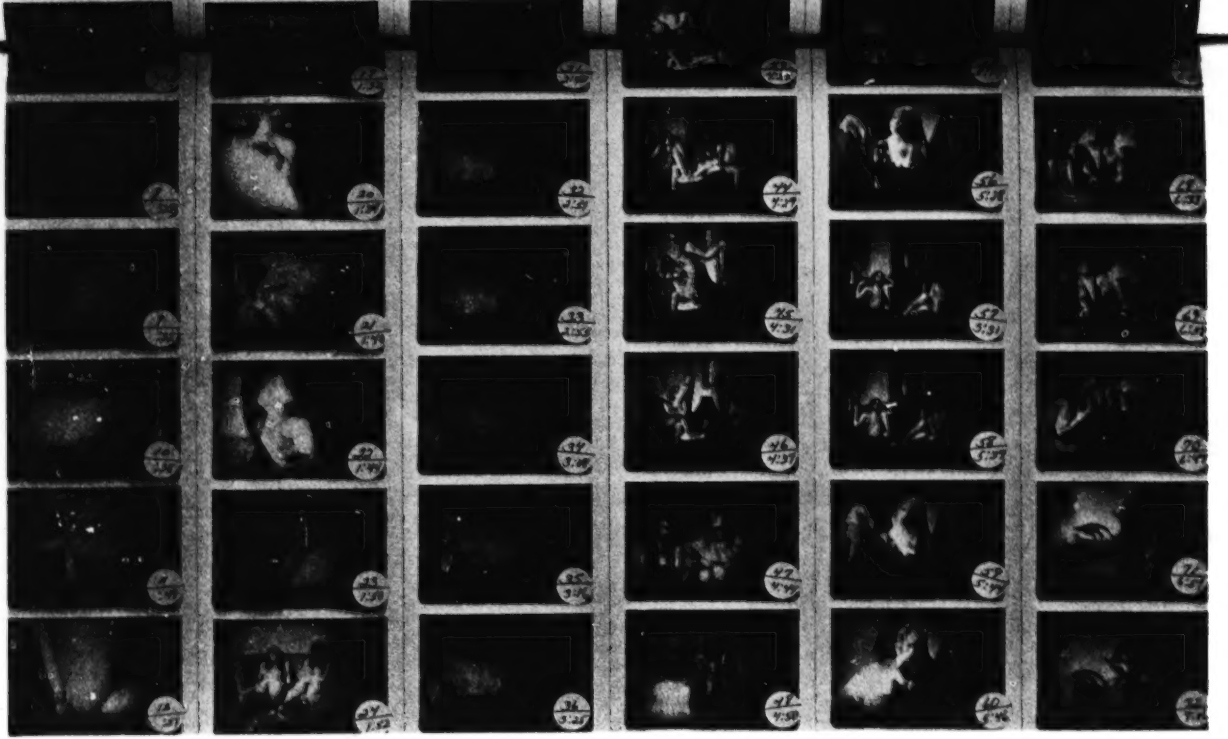
Sworn to before me and subscribed in my presence this ___ day of February, 1973.

_____
Notary Public

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 1 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"DOCUMENTARY OF A MADAM"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 2 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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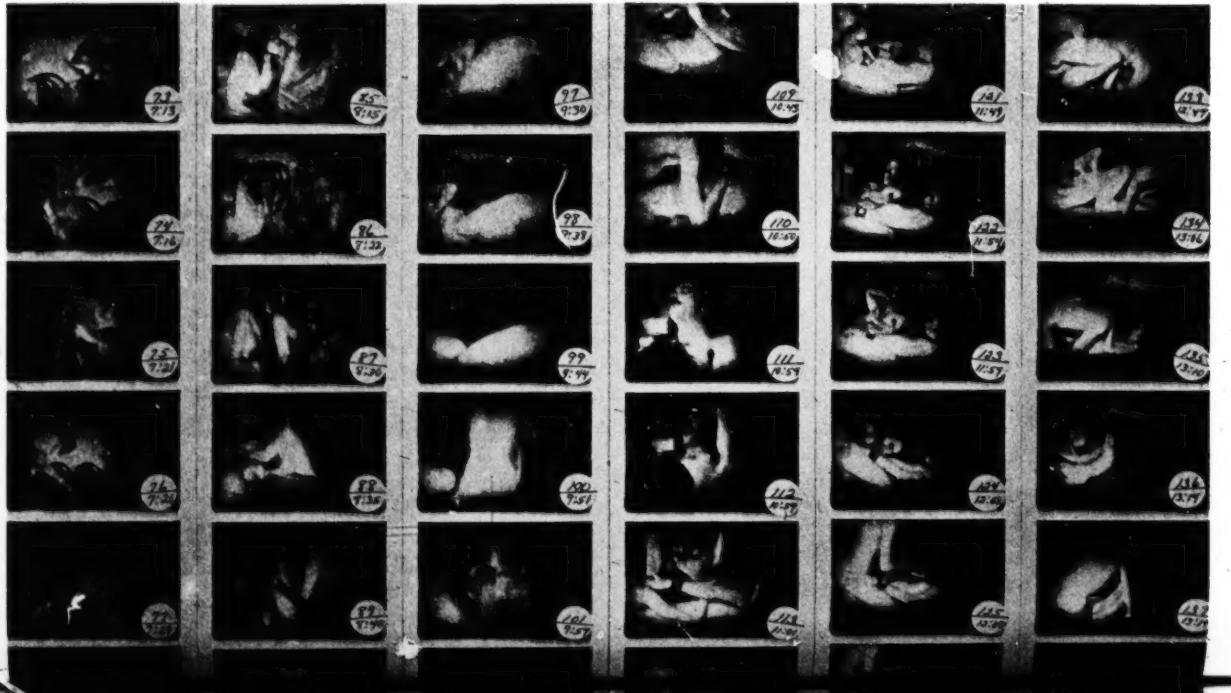

"DOCUMENTARY OF A MADAM" - Fellatio 103 - sexual intercourse 105 - fellatio 113, 114 - sexual intercourse 116 thru 135

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 3 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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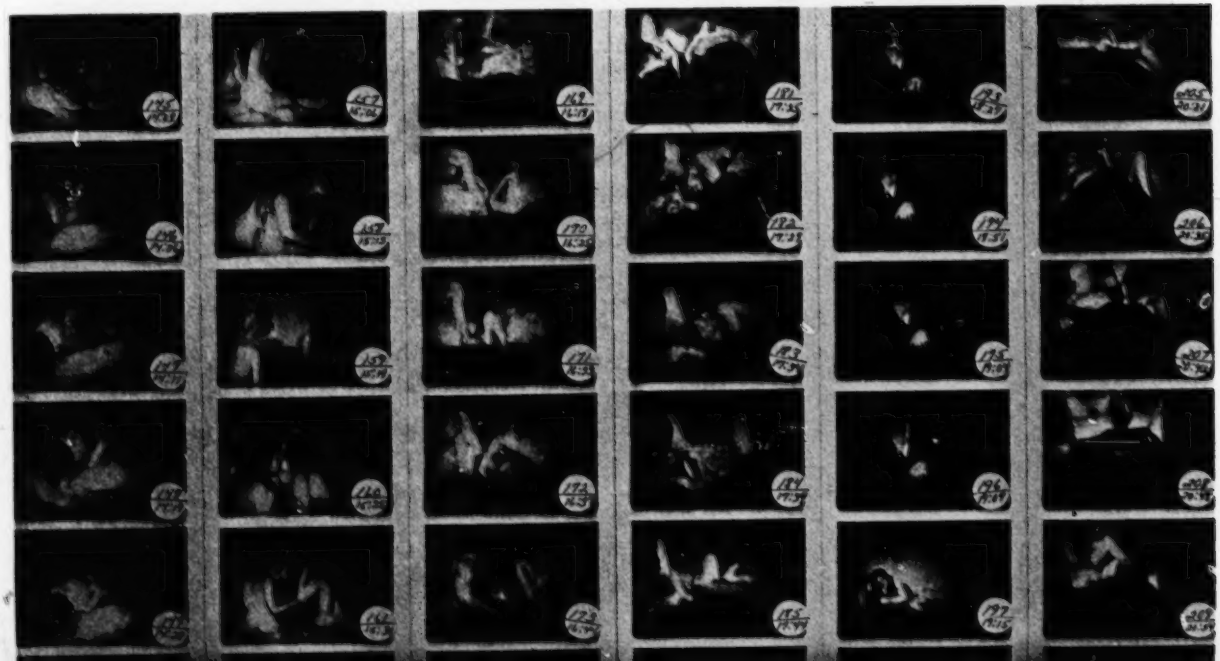

"DOCUMENTARY OF A MADAM " - Fellatio 147 thru 154 - sexual intercourse, group sex, lesbianism 157 thru 184

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 4 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"DOCUMENTARY OF A MADAM" - Fellatio, group sex 235 thru 241 - fellatio 250 thru 282 - cunnilingus, fellatio, sexual intercourse 250 thru 288

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 5 of 18 PARTS

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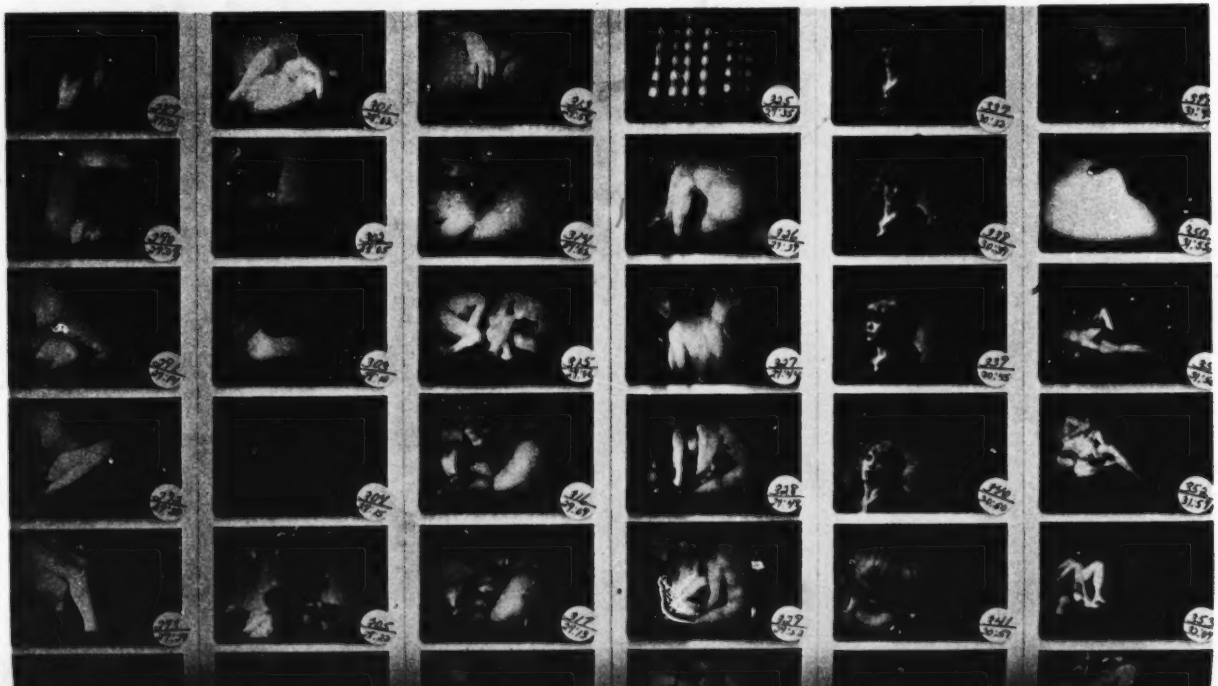

"DOCUMENTARY OF A MADAM" - Sexual intercourse, cunnilingus 289 thru 323

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 6 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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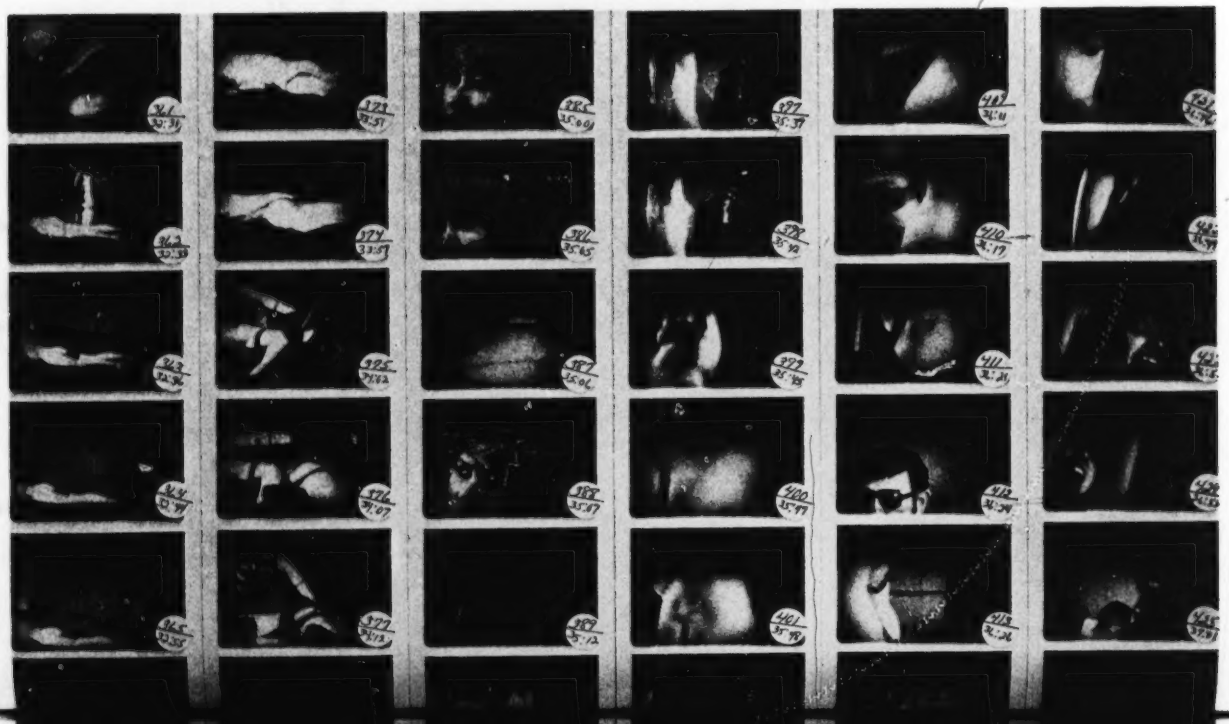

"DOCUMENTARY OF A MADAM"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 7 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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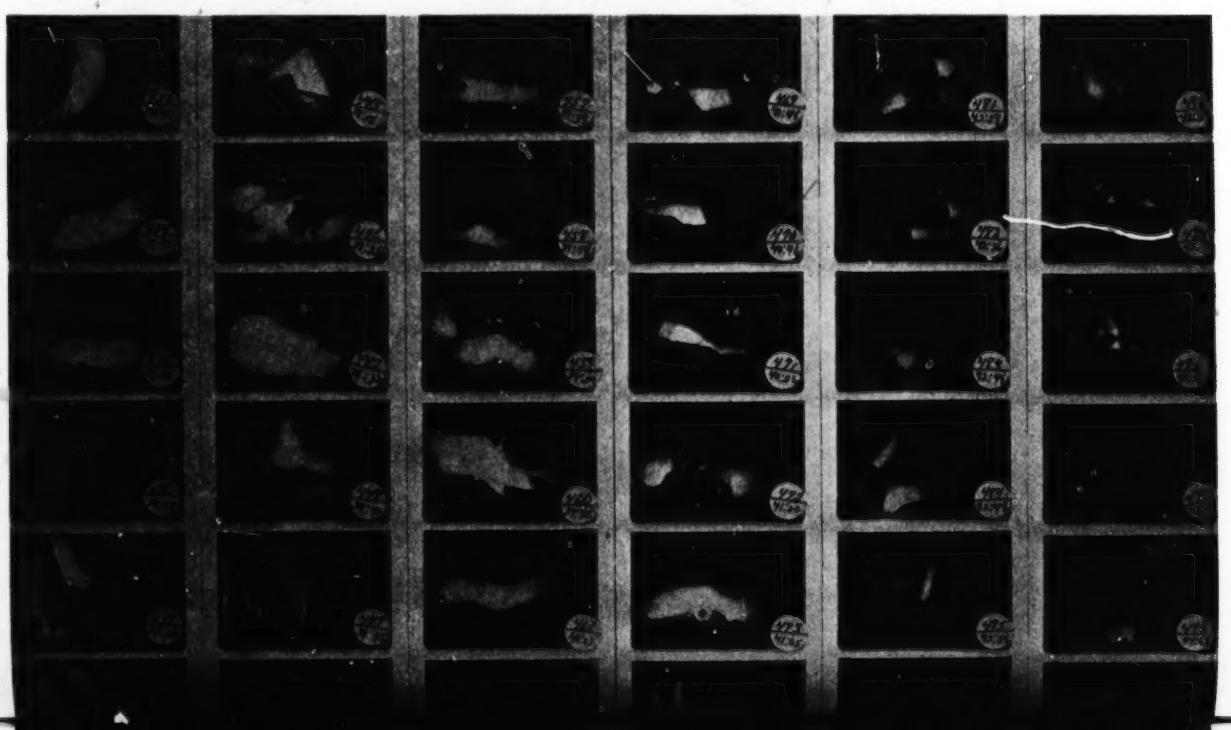

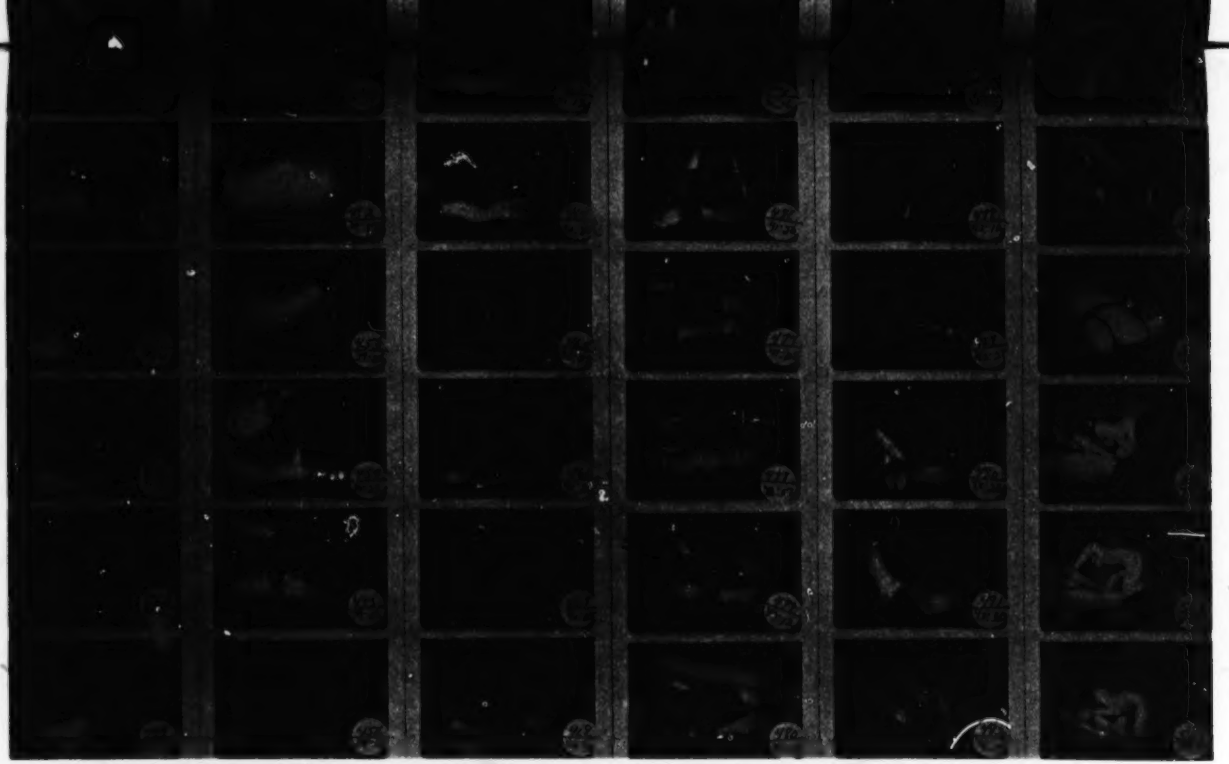



"DOCUMENTARY OF A MADAM" - Cunnilingus 458 thru 461 - sexual intercourse 465 thru 472 - cunnilingus 475 - sexual intercourse 476 thru 489 - lesbianism 502 thru 504

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 8 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"DOCUMENTARY OF A MADAM" - Lesbianism, cunnilingus 505 thru 551 - female masturbating another with electric vibrator 571 thru 576

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 9 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"DOCUMENTARY OF A MADAM" - Females performing sexual intercourse by use of dildo 585 thru 597 - Previews 636 thru 648

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 10 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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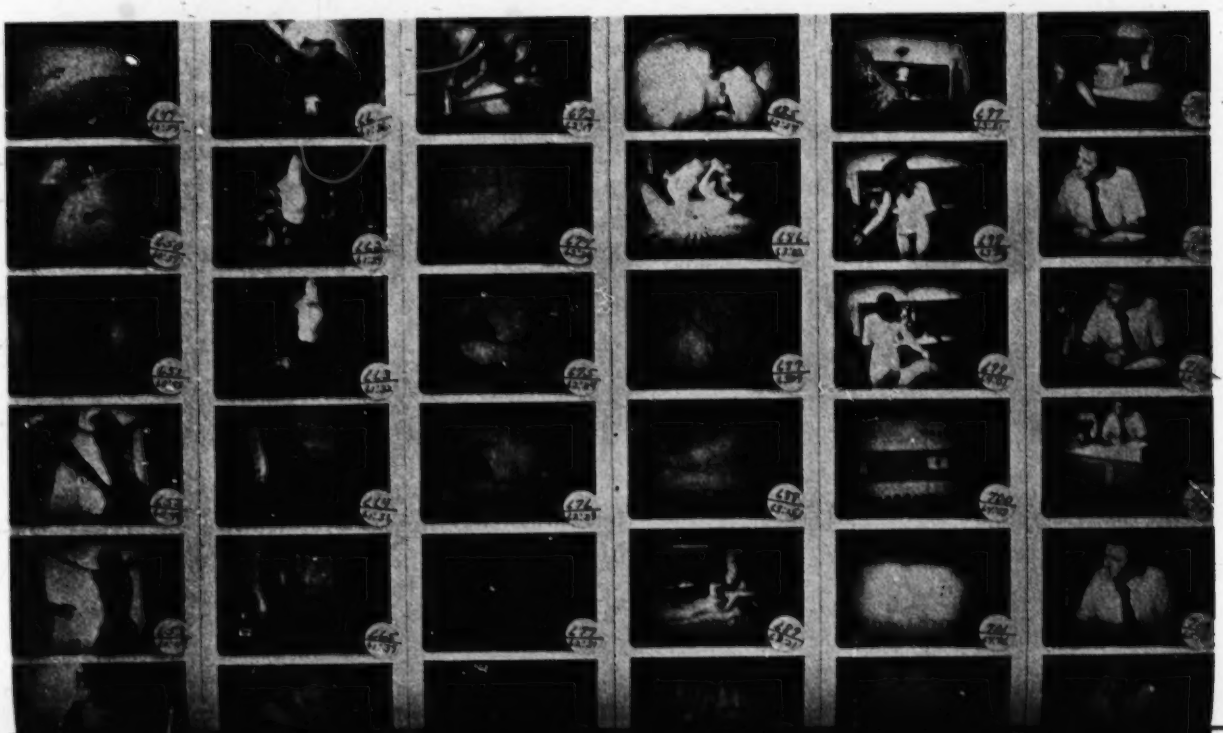

"HEDONIST HYPNOTIST" - Previews 649 thru 700 title appears The Hedonist Hypnotist 701 thru 705

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 11 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 12 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Sexual intercourse 827 thru 844 - lesbianism 859 thru 864

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 13 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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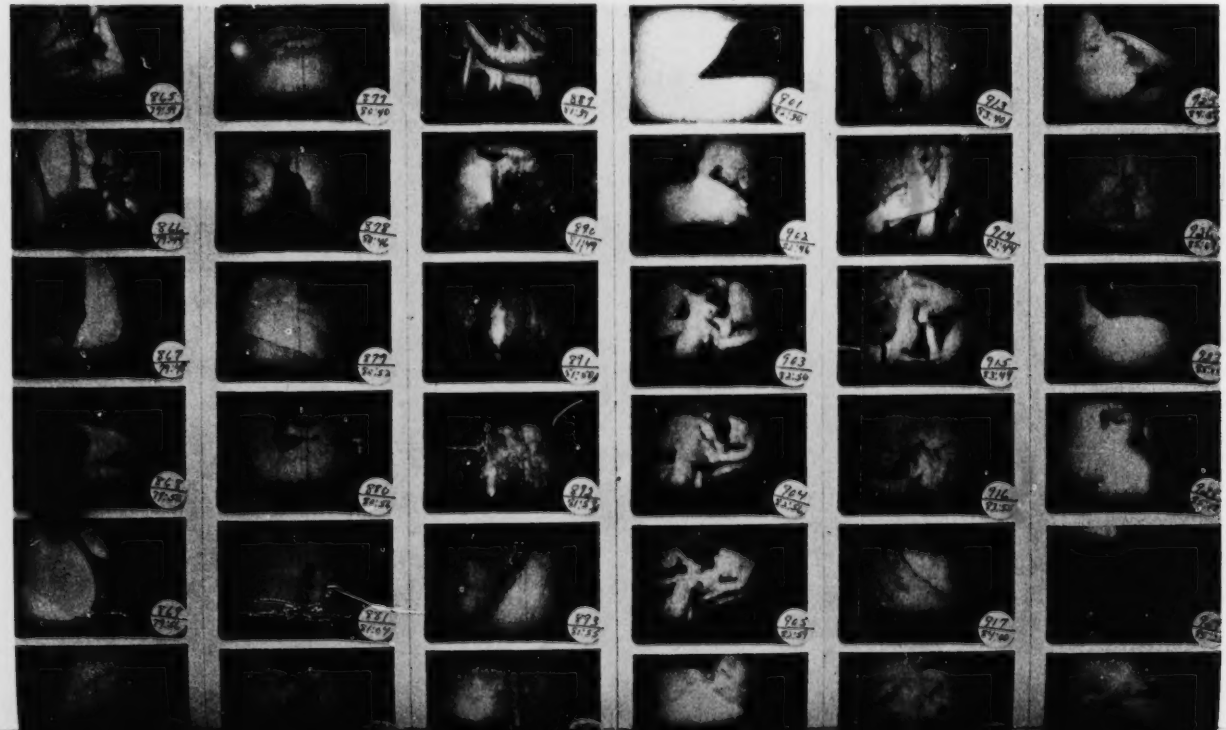

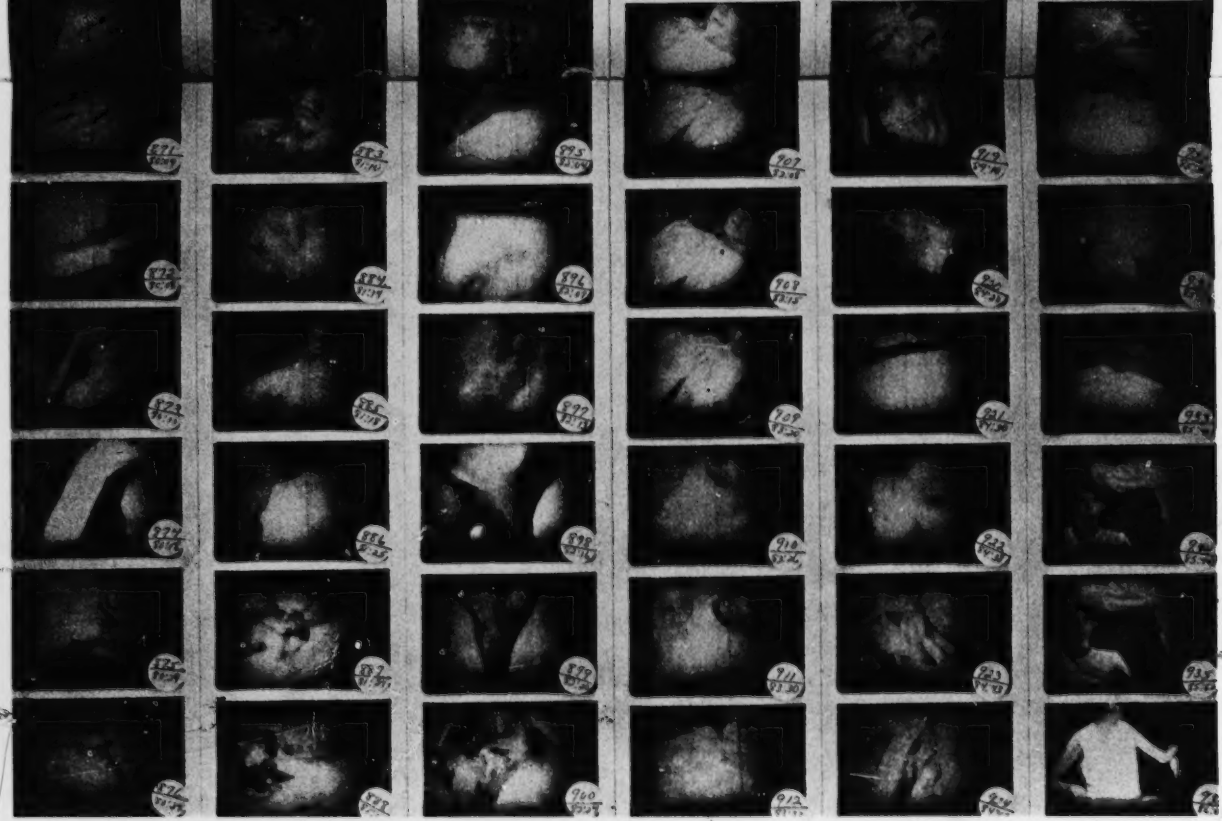

"HEDONIST HYPNOTIST" - Lesbianism, cunnilingus 865 thru 933

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 14 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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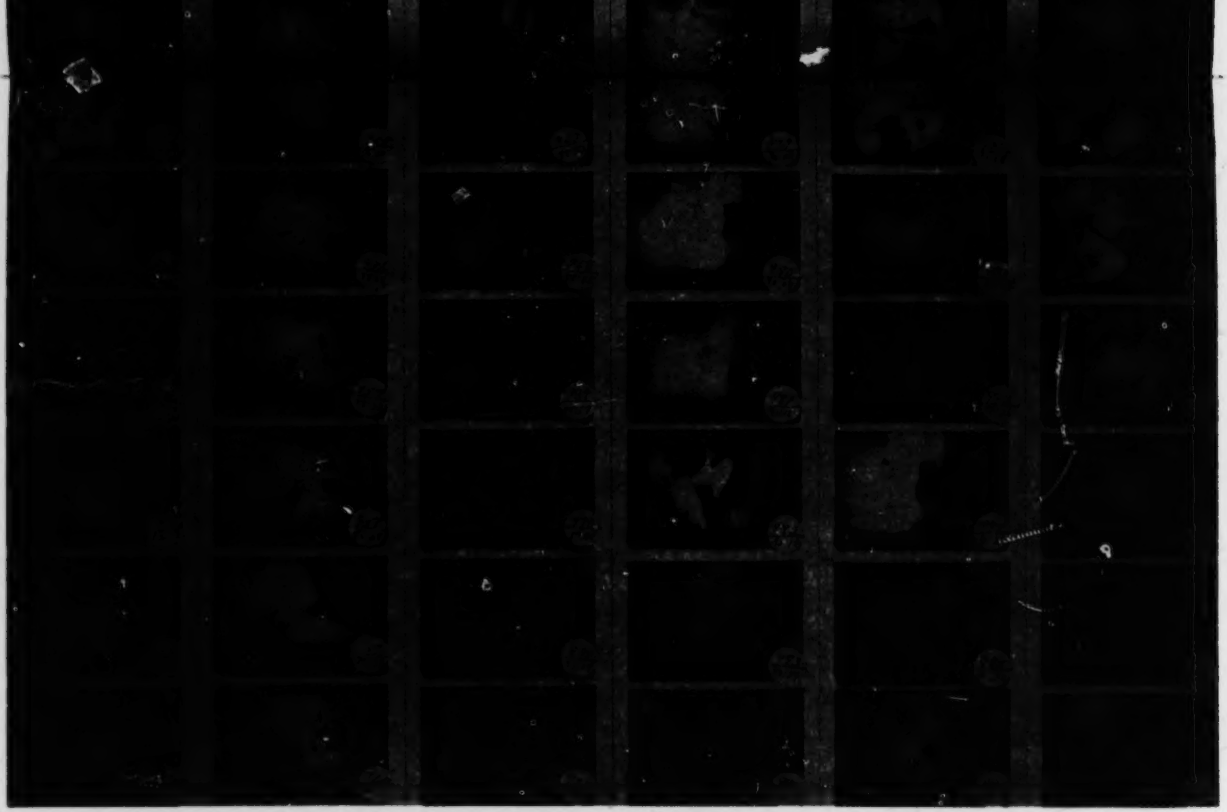

"HEDONIST HYPNOTIST" - Female masturbates 955 thru 976

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 15 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 16 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Sexual intercourse 1084 thru 1095 - lesbianism, cunnilingus 1107 thru 1139

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 17 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Group sex 1154 thru 1202

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 18 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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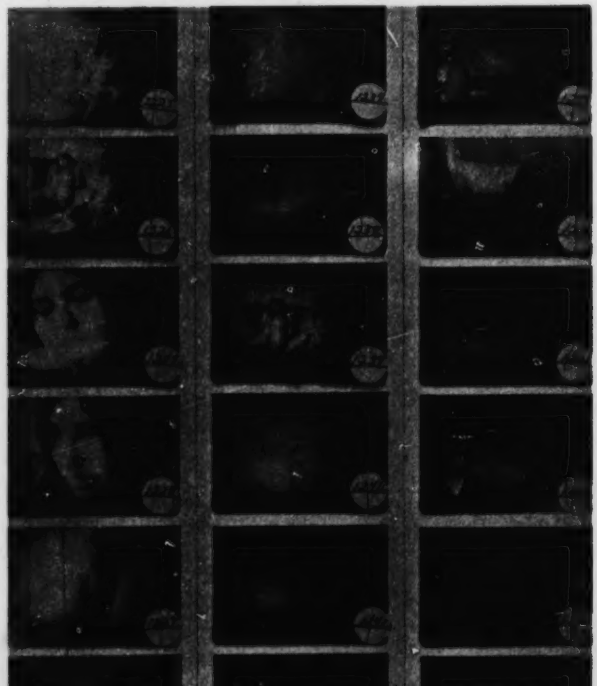

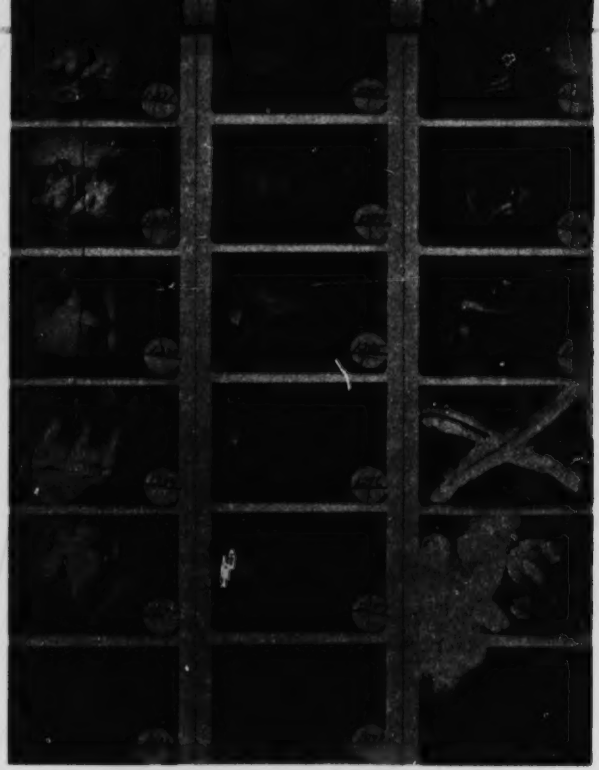

"HEDONIST HYPNOTIST" - End 1240

# Appendix Q


| | Page |
|---|---|
| Affidavit of Larry Winegardner. . . . . | 2-3 |
| Time Motion Study of Films "The Chateau" and "Dirt Bike Bangers" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432 . . . | 4-41 |

Q-2

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 23, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "The Chateau" and "Dirt-Bike Bangers".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1. At photographs 317-337 — fellatio
2. at photographs 338-340 — Sexual intercourse
3. at photographs 345-348 — sexual intercourse
4. at photographs 354-377 — anal sodomy
5. at photographs 635-641 — ~~cunnilingus (female on female)~~
6. at photographs 717-720 — cunnilingus
7. at photographs 722-728 — sexual intercourse
8. at photographs 733-734 — sexual intercourse
9. at photographs 741-746 — sexual intercourse
10. at photographs 758-765 — fellatio

| | | |
|---|---|---|
| 11. | at photographs 771-775 | fellatio |
| 12. | at photographs 777-781 | fellatio |
| 13. | at photographs 796-808 | female masturbating herself |
| 14. | at photographs 817-820 | fellatio |
| 15. | at photographs 902-910 | sexual intercourse |
| 16. | at photographs 946-975 | lesbianism |
| 17. | at photographs 953-972 | cunnilingus (female on female) |
| 18. | at photographs 1029-1047 | sexual intercourse |
| 19. | at photographs 1098-1104 | sexual intercourse |
| 20. | at photographs 1112-1115 | sexual intercourse |
| 21. | at photographs 1273-1284 | sexual intercourse |

Further affiant saith not.

Harry A Wineguardner

Sworn to before me and subscribed in my presence, this 7TH day of February, 1973.

Notary Public

[illegible]
Notary Public, State of Ohio
[illegible]

**TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 1 of 19 PARTS**

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"THE CHATEAU" - Previews 1-72

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 2 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU" - Previews 73-120, Feature The Chateau starts 124

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 3 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS". - PART 4 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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Q-10

1

"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 5 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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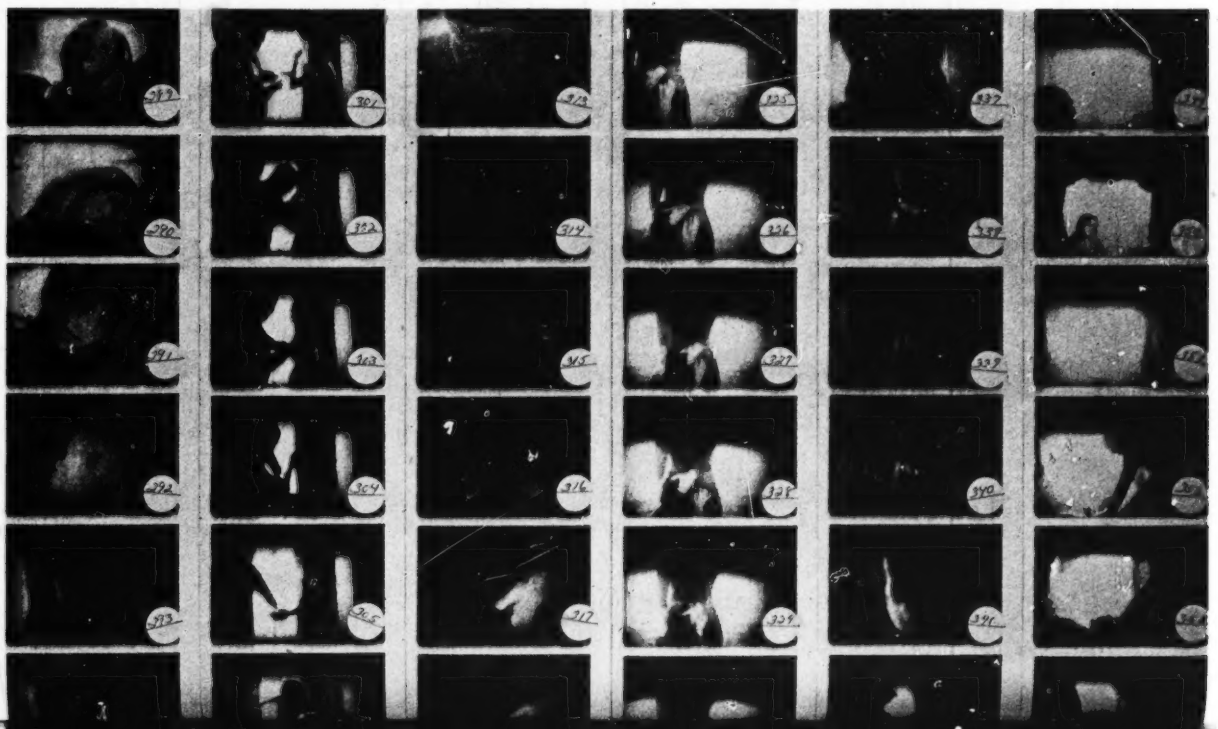

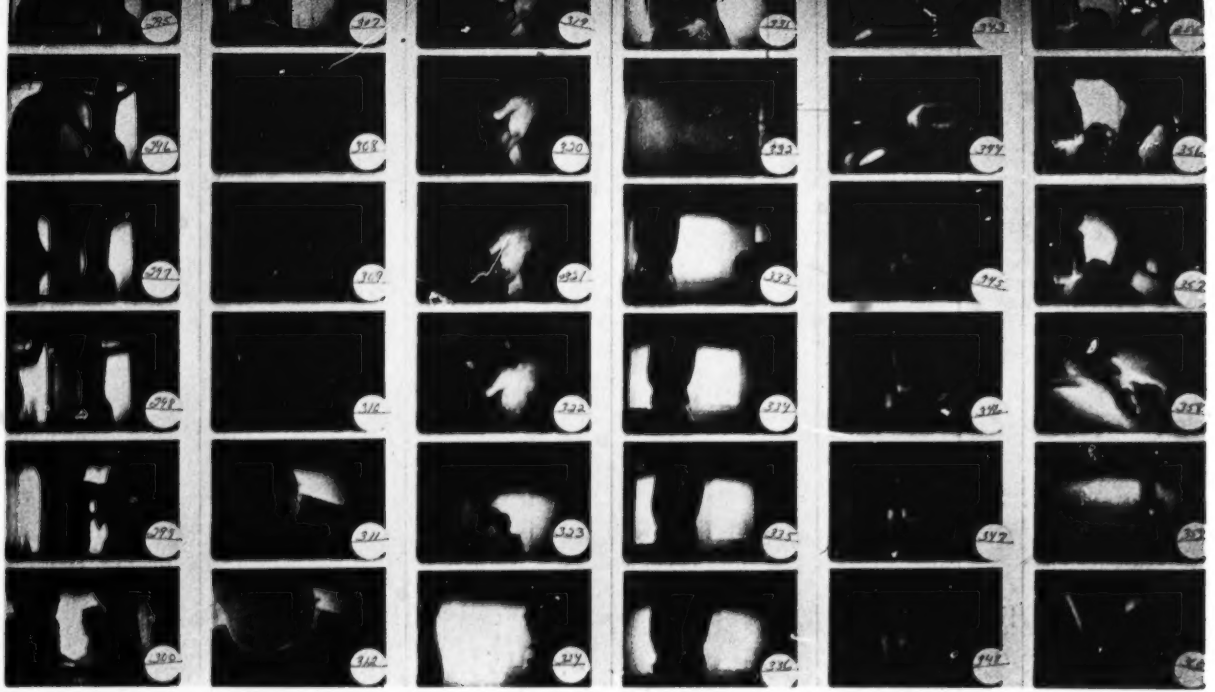

"THE CHATEAU" - Fellatio 317-337, sexual intercourse 338-340, 345-348, anal sodomy 354-360

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 6 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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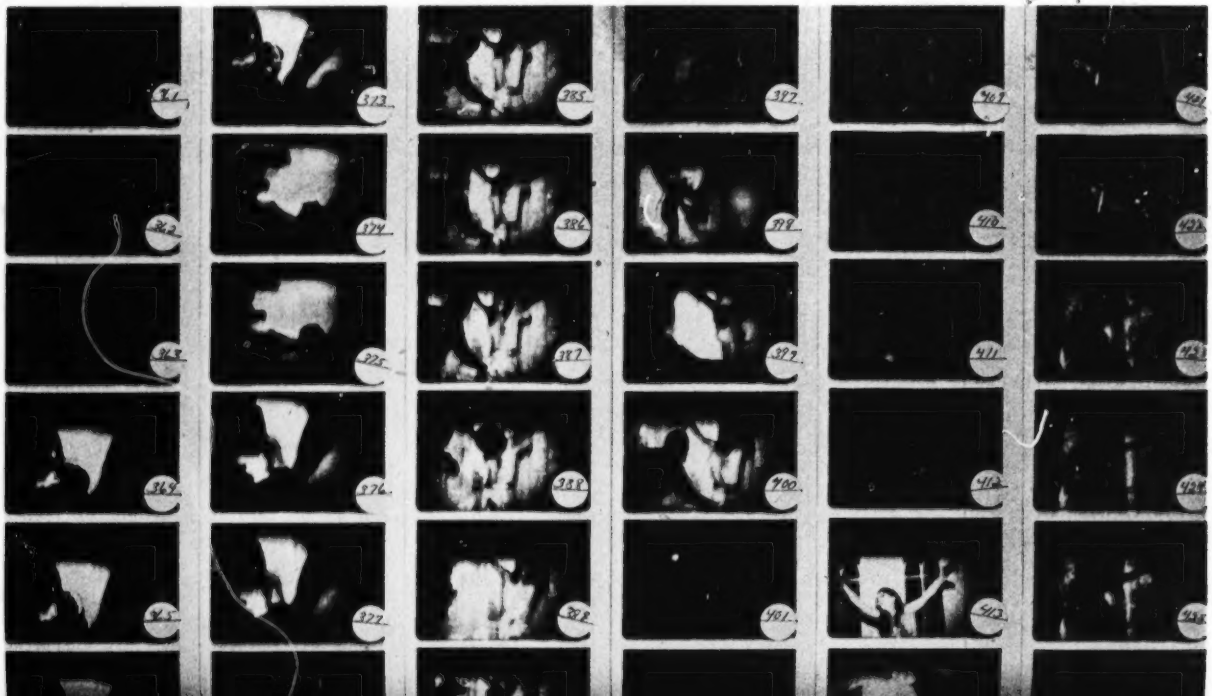

"THE CHATEAU" - Anal sodomy 361-377

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 7 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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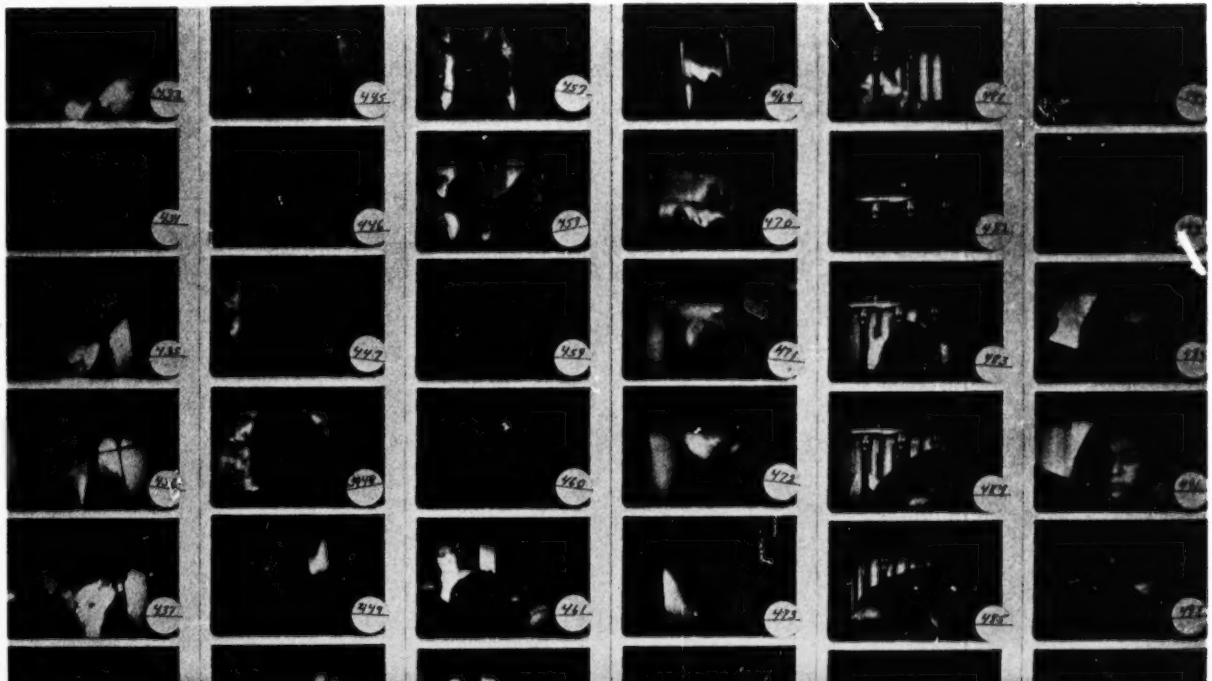

"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 8 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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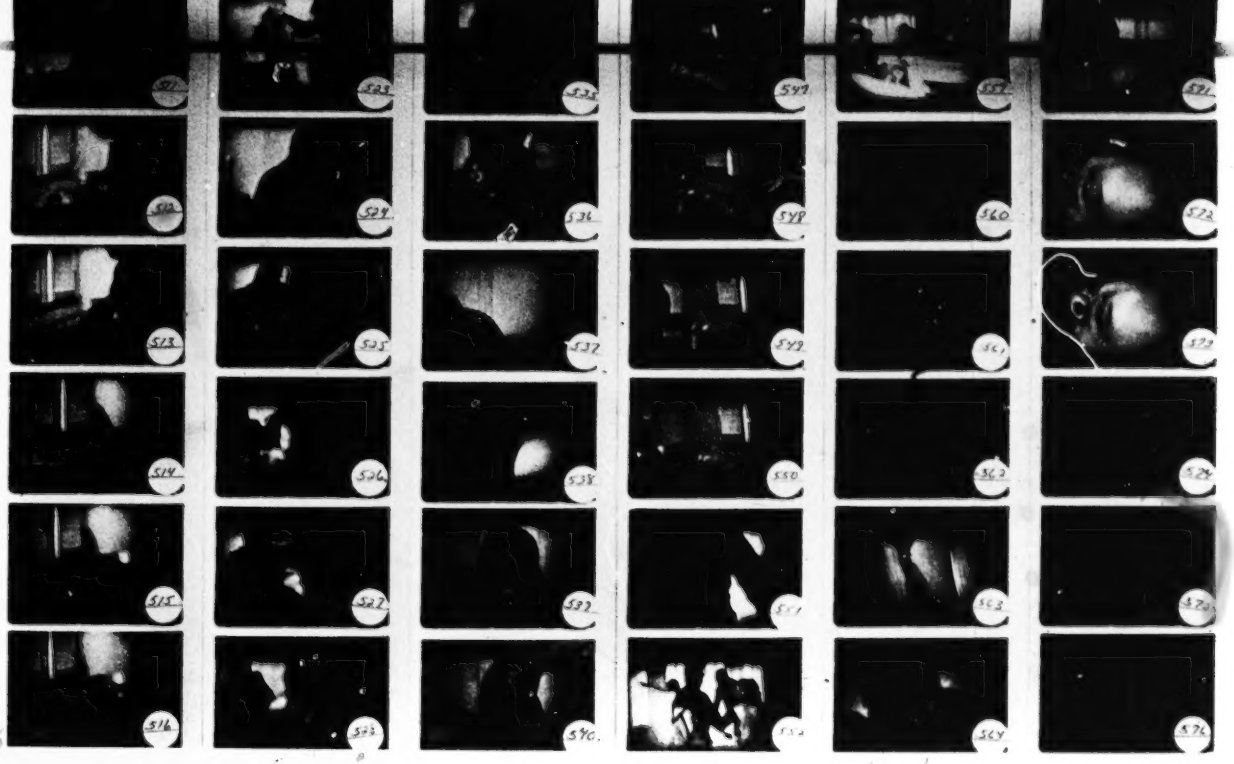

"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 9 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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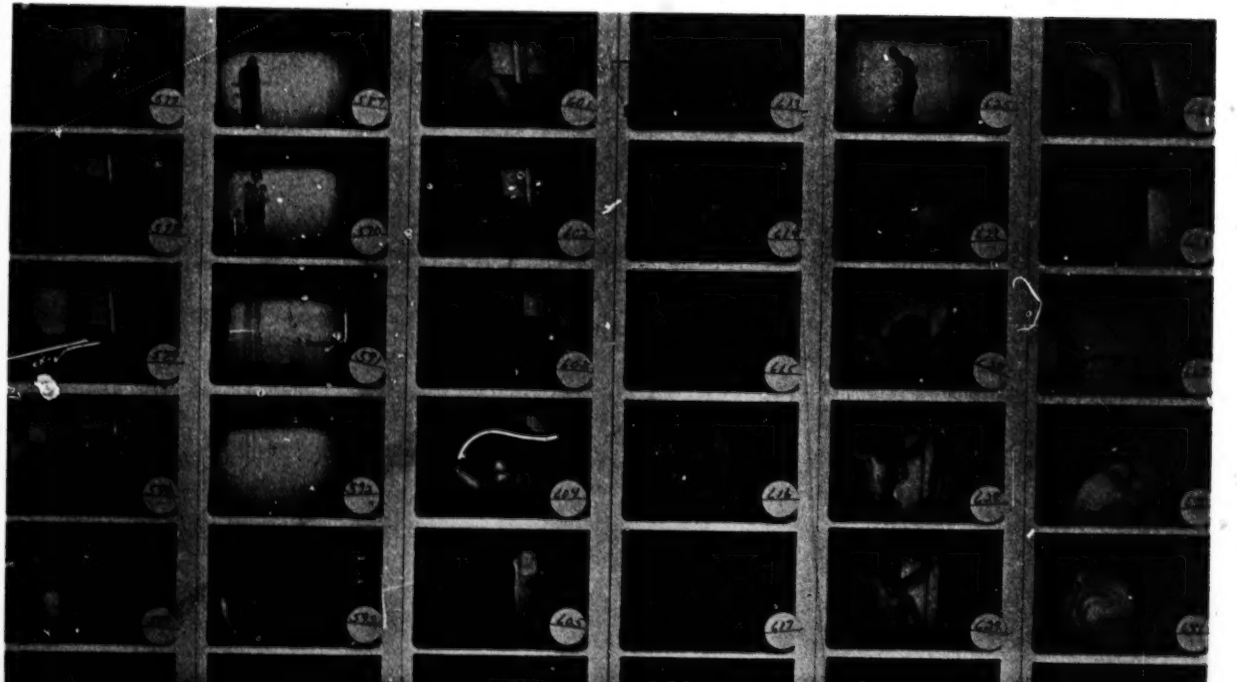

"THE CHATEAU" - Cunnilingus (female on female) 635-641

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 10 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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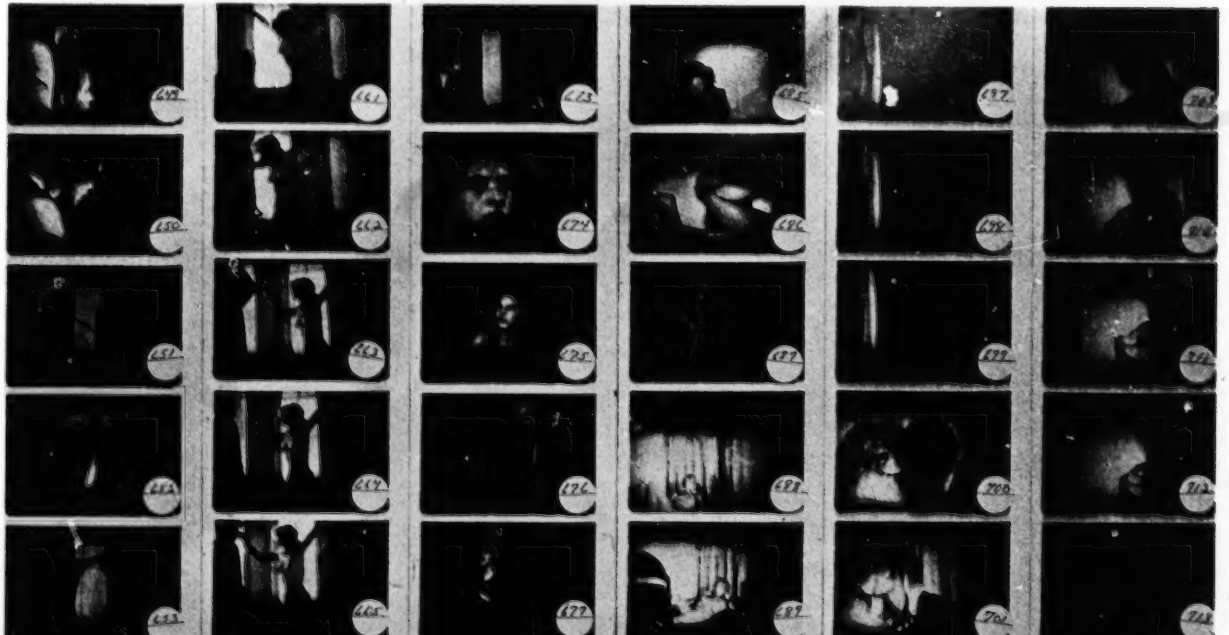
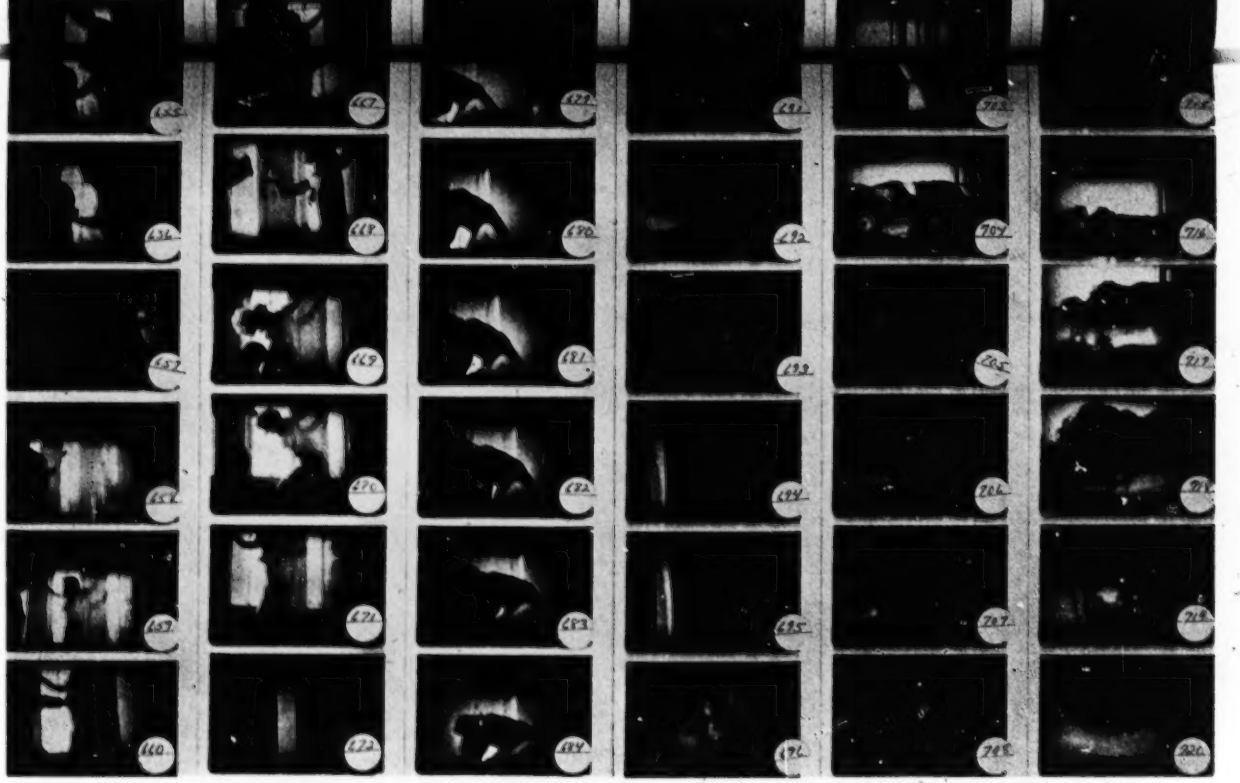


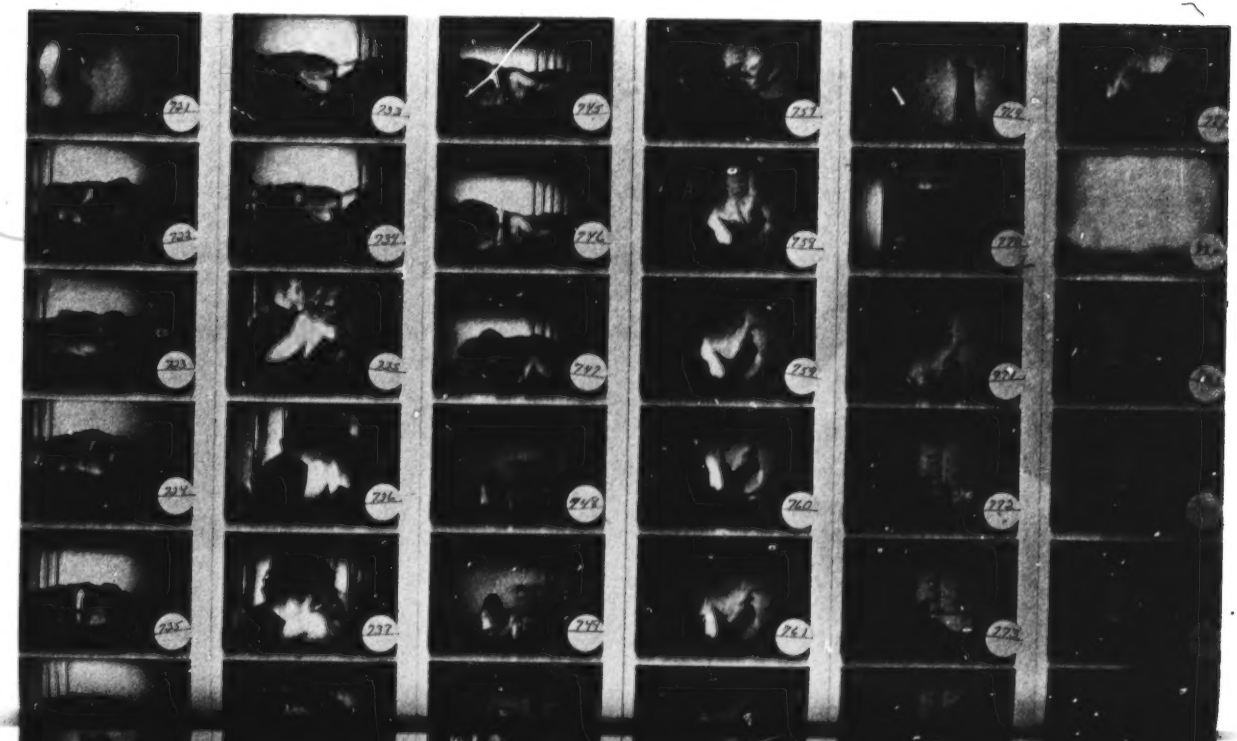


"THE CHATEAU" - Cunnilingus 717-720

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 11 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

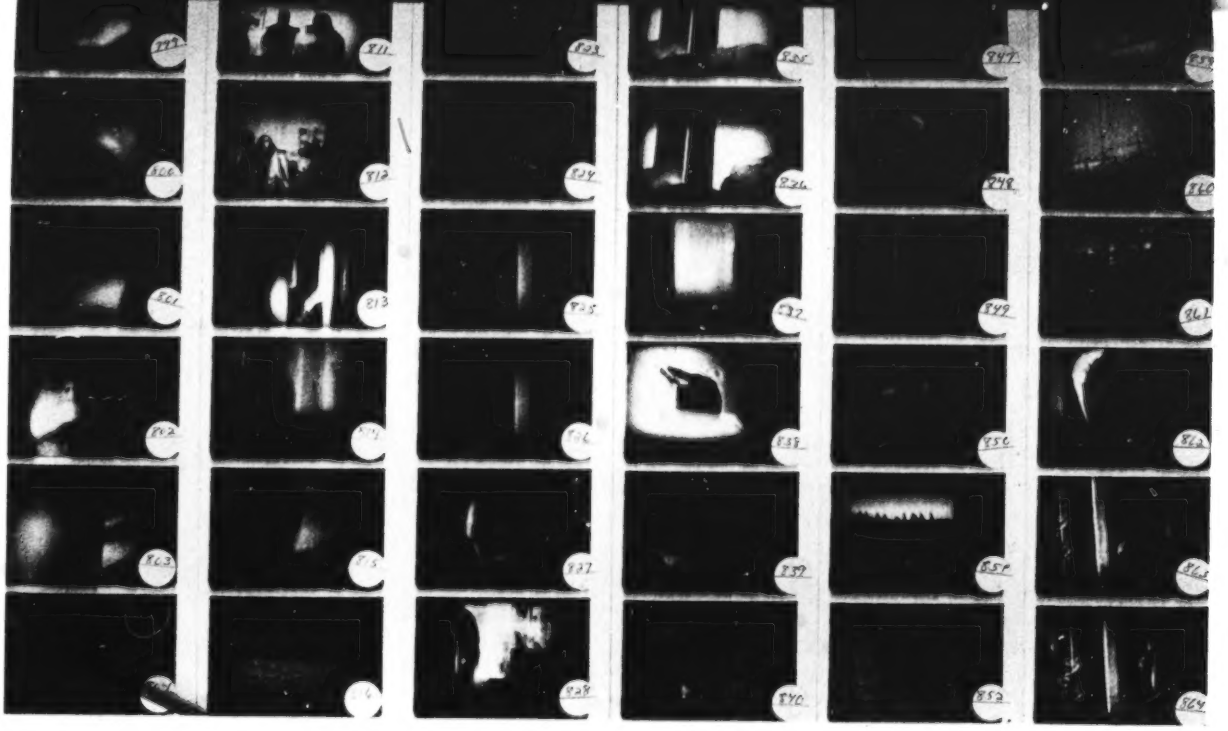


"THE CHATEAU" - Sexual intercourse 722-728, 733-734, 741-746, fellatio 758-765, 771-775, 777-781

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 12 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"THE CHATEAU" - Female masturbation 796-808, fellatio 817-820, End 844
"DIRT BIKE BANGERS" Title 845-846

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 13 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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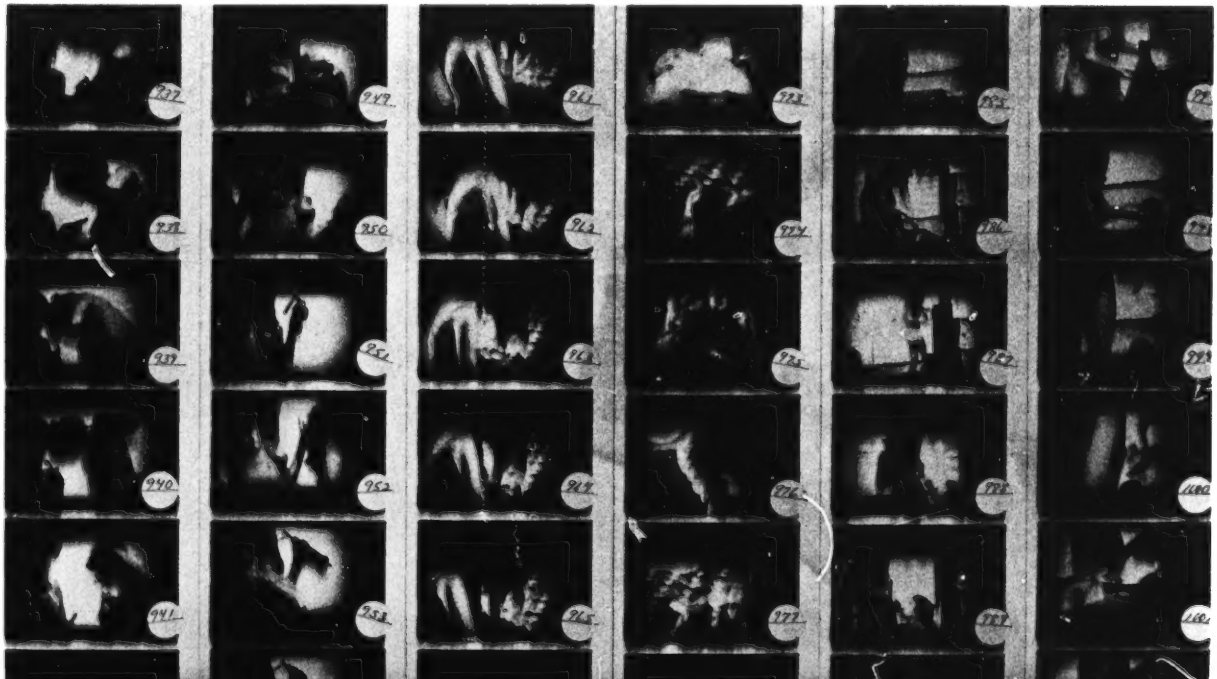
"DIRT BIKE BANGERS" - Sexual intercourse 902-910

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 14 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"DIRT BIKE BANGERS" - Lesbianism 946-948, cunnilingus (female on female) 953-972

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 15 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DIRT BIKE BANGERS" - Sodomy 1029-1047

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 16 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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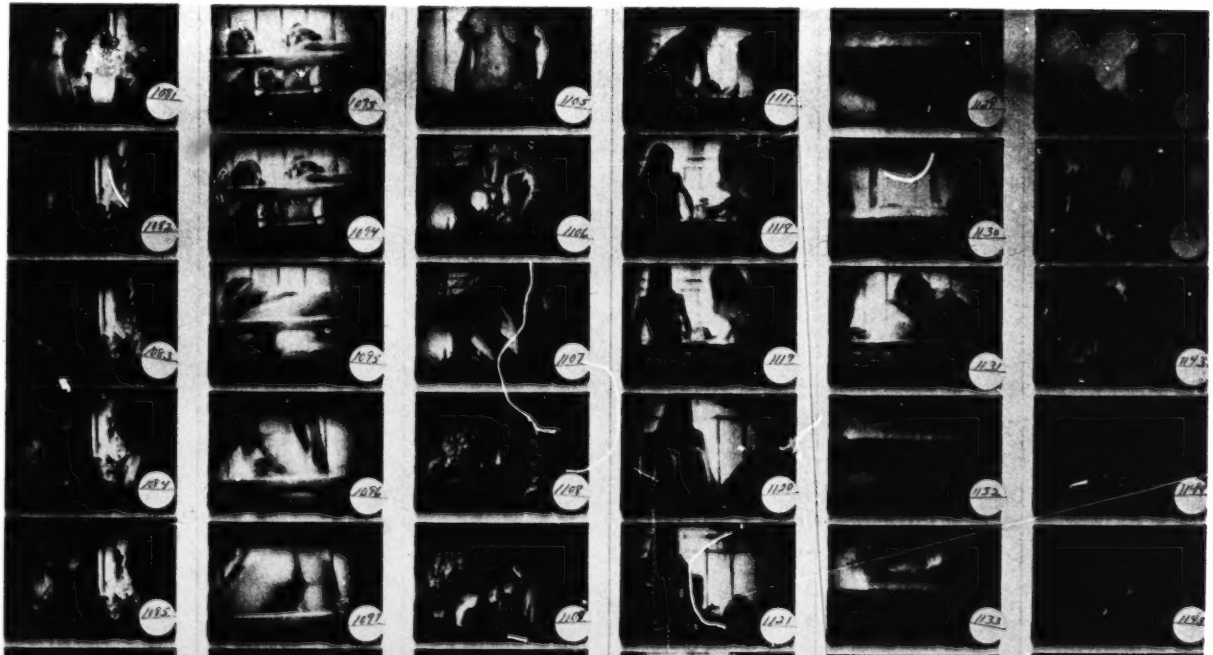

"DIRT BIKE BANGERS" - Sexual intercourse 1098-1104, 1112-1115

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 17 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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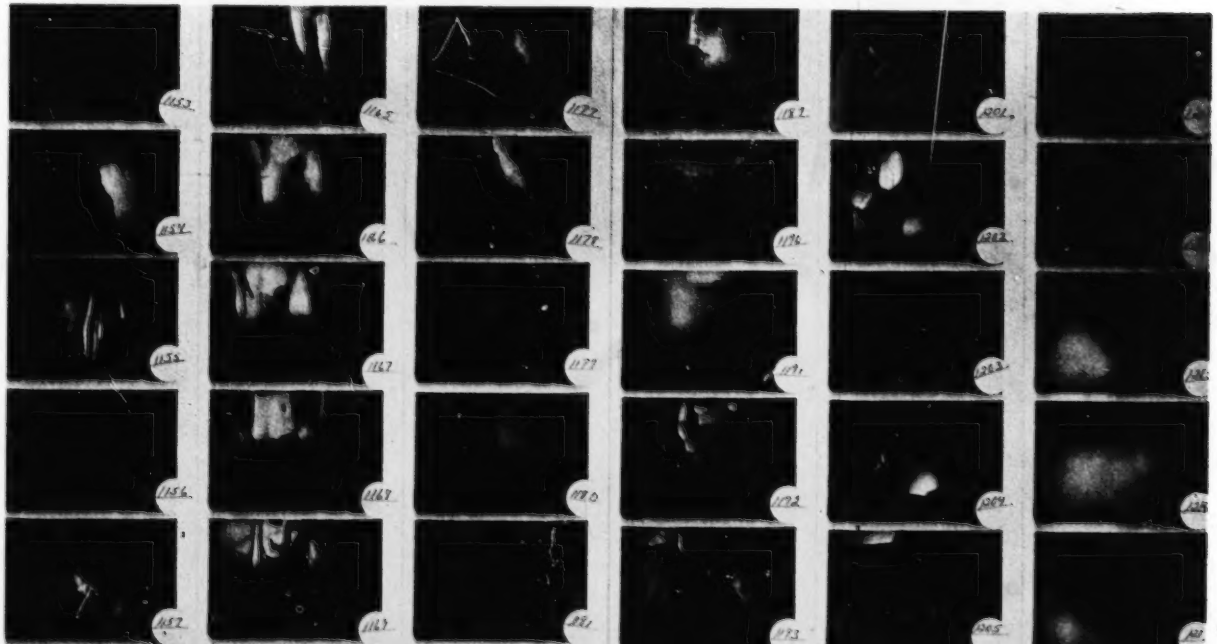

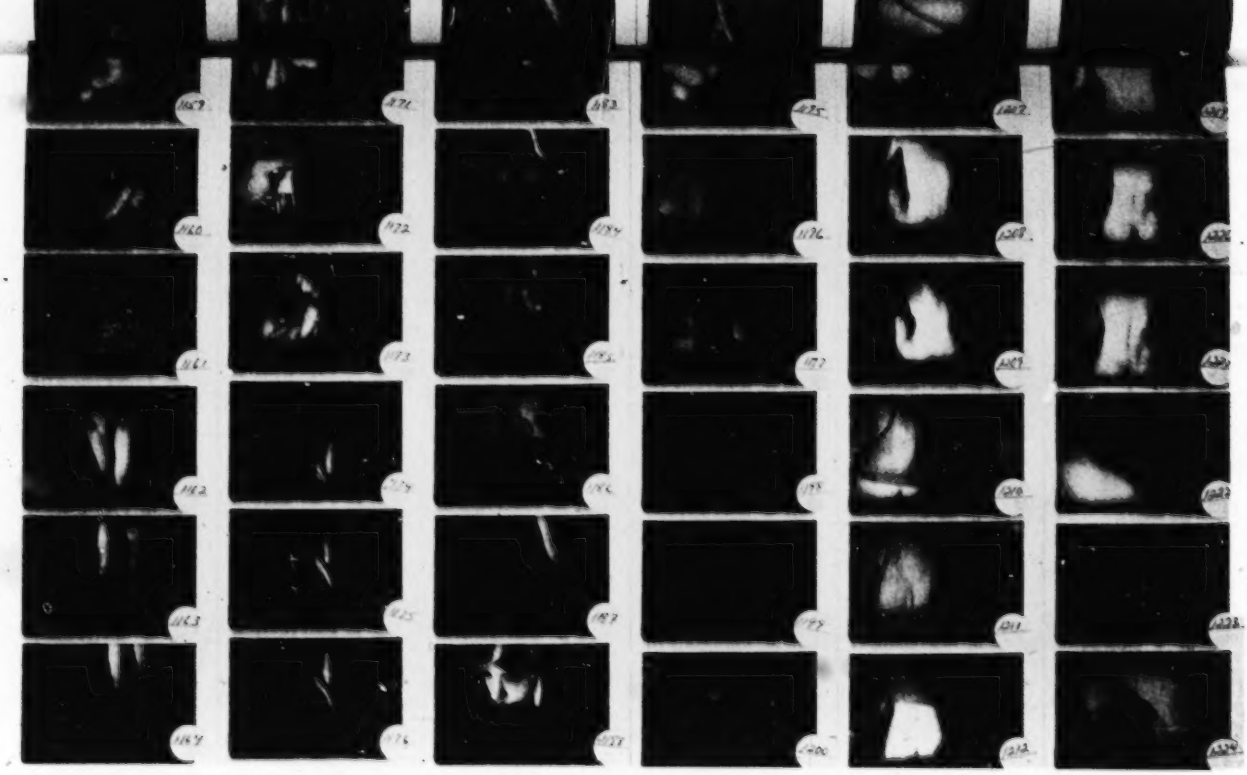

"DIRT BIKE BANGERS"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 18 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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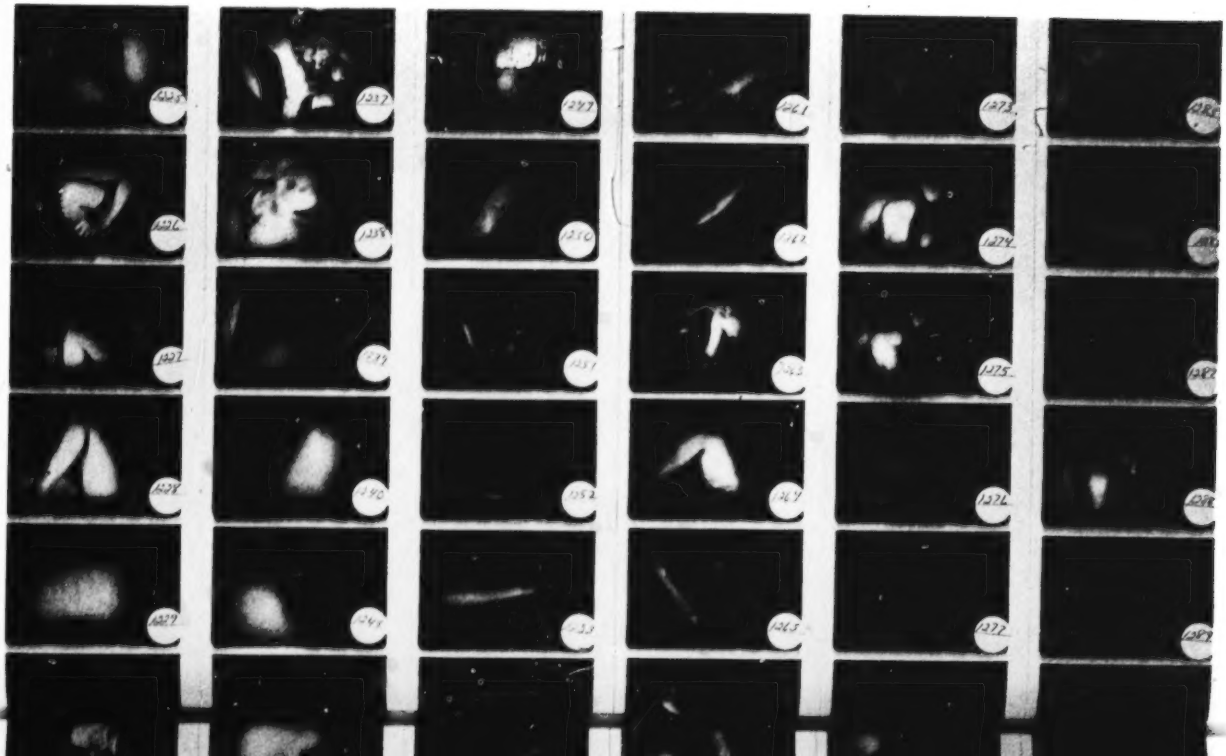

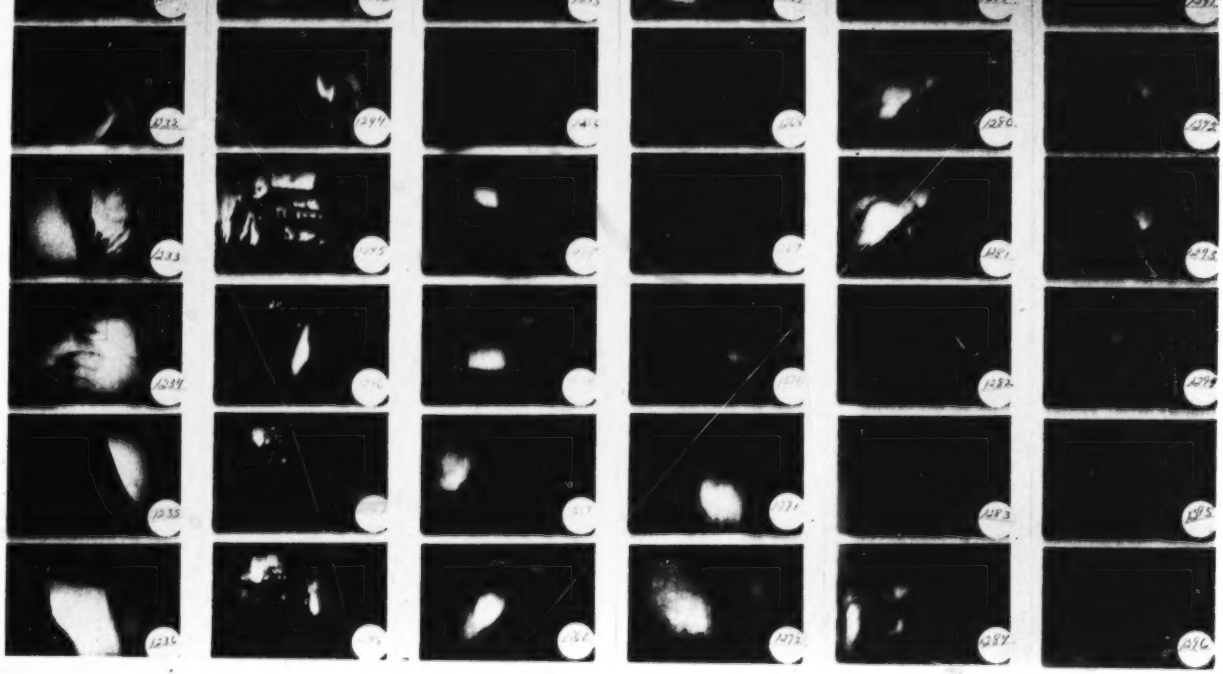

"DIRT BIKE BANGERS" - Sexual intercourse 1273-1284

**TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 19 of 19 PARTS**

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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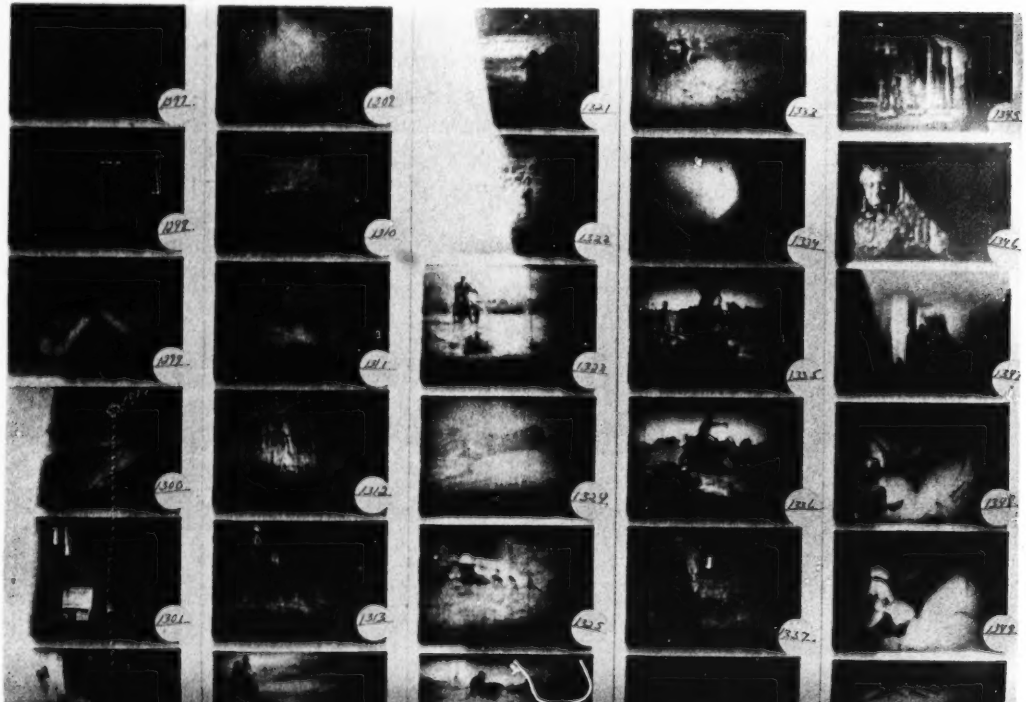
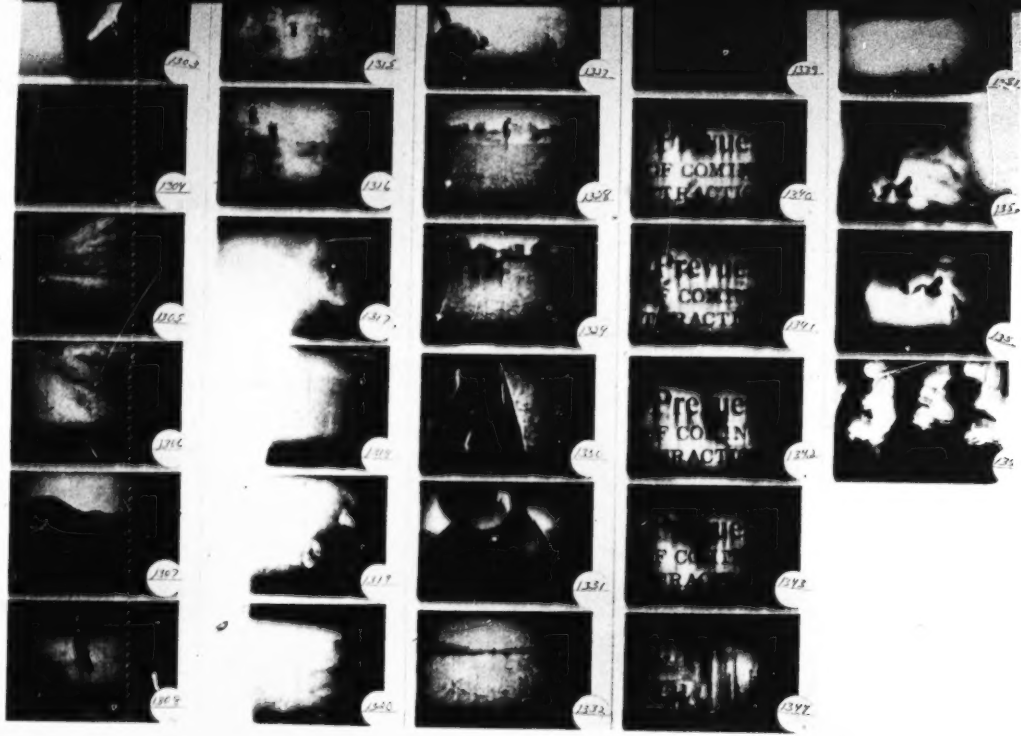




"DIRT BIKE BANGERS" - End 1338, Previews 1340-1359

# Appendix R


| | Page |
|---|---|
| Affidavit of Larry Winegardner. . . . . | 3-5 |
| Time Motion Study of Films "Hundred Dollar Wife" and "Massage Parlor" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432. . . . . | 6-51 |

R-3

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 24, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, 669 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Hundred Dollar Wife" and "Massage Parlor".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1. at photographs 100-111 fellatio
2. at photographs 120-122 Sexual intercourse
3. at photographs 124-128 cunnilingus
4. at photographs 145-152 cunnilingus
5. at photographs 182-186 fellatio
6. at photographs 196-208 cunnilingus
7. at photographs 215-217 cunnilingus
8. at photographs 222-224 fellatio

| | | |
|---|---|---|
| 9. | at photographs 228-239 | male performing cunnilingus on female; female performing fellatio on male |
| 10. | at photographs 240-252 | cunnilingus |
| 11. | at photographs 270-285 | sexual intercourse |
| 12. | at photographs 286-288 | male performing cunnilingus on female; female performing fellatio on male |
| 13. | at photographs 291-344 | sexual intercourse |
| 14. | at photographs 401-459 | lesbianism |
| 15. | at photographs 429-458 | cunnilingus (female on female) |
| 16. | at photographs 540-541 | sexual intercourse |
| 17. | at photographs 566-568 | cunnilingus |
| 18. | at photographs 572-577 | fellatio |
| 19. | at photographs 579-594 | sexual intercourse |
| 20. | at photographs 611-632 | sexual intercourse |
| 21. | at photographs 611-615 | close-up of penetration |
| 22. | at photographs 745 | sexual intercourse |
| 23. | at photographs 790-791 | cunnilingus |
| 24. | at photographs 956-990 | fellatio |
| 25. | at photographs 1059-1100 | female puts male penis in hot dog bun and performs fellatio |
| 26. | at photographs 1109-1146 | cunnilingus |
| 27. | at photographs 1157-1169 | sexual intercourse |
| 28. | at photographs 1170-1192 | male performing cunnilingus on female; female performing fellatio on male |
| 29. | at photographs 1193-1208 | sexual intercourse |
| 30. | at photographs 1219-1247 | sexual intercourse |
| 31. | at photographs 1248-1282 | sexual intercourse |
| 32. | at photographs 1287-1307 | sexual intercourse |

| | | |
|---|---|---|
| 33. | at photographs 1308-1340 | sexual intercourse |
| 34. | at photographs 1341-1367 | sexual intercourse |
| 35. | at photographs 1371-1375 | cunnilingus |
| 36. | at photographs 1417-1441 | group sex (cunnilingus, anal sodomy, etc) |
| 37. | at photographs 1494-1505 | fellatio |
| 38. | at photographs 1531-1537 | sexual intercourse |
| 39. | at photographs 1538-1540 | fellatio |
| 40. | at photographs 1541-1543 | sexual intercourse |
| 41. | at photographs 1555-1561 | sexual intercourse |
| 42. | at photographs 1562-1566 | cunnilingus |
| 43. | at photographs 1567-1569 | sexual intercourse |
| 44. | at photographs 1570-1574 | cunnilingus performed on female by male; fellatio performed on male by female. |
| 45. | at photographs 1575-1576 | sexual intercourse |
| 46. | at photographs 1577-1578 | cunnilingus |
| 47. | at photographs 1579-1584 | fellatio |

Further affiant saith not.

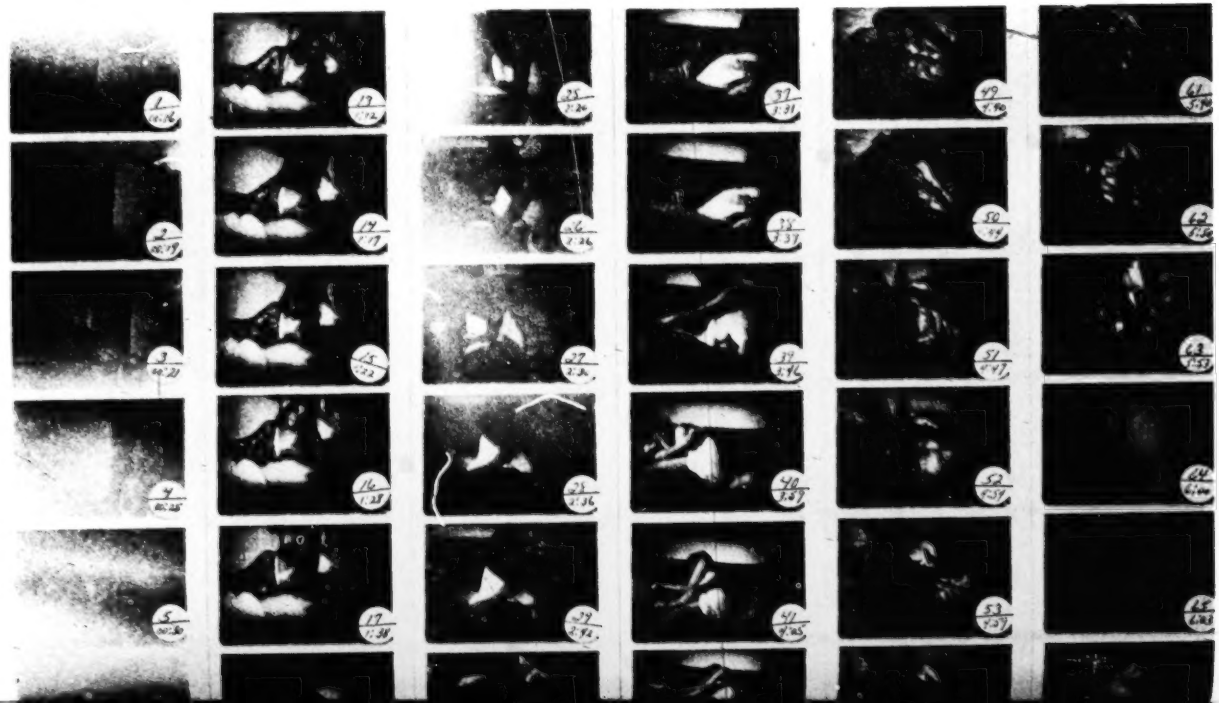
Sworn to before me and subscribed in my presence, this 6TH day of February, 1973.

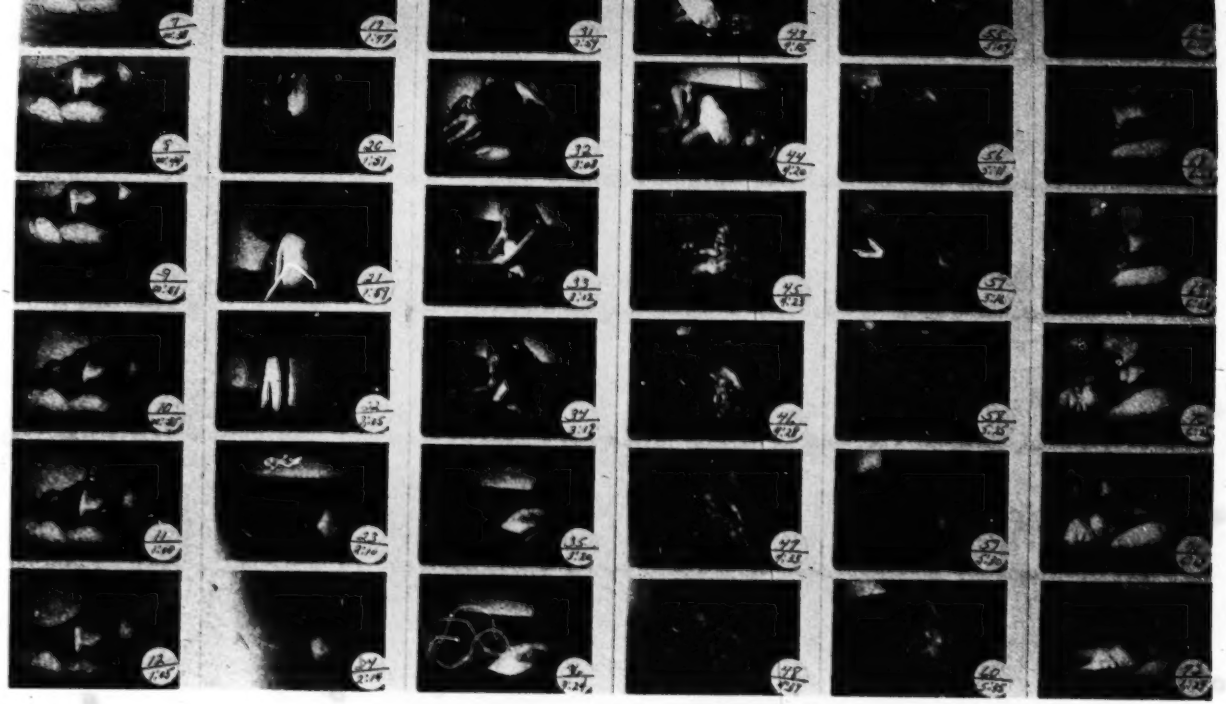
Notary Public

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 1 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"100 DOLLAR WIFE"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 2 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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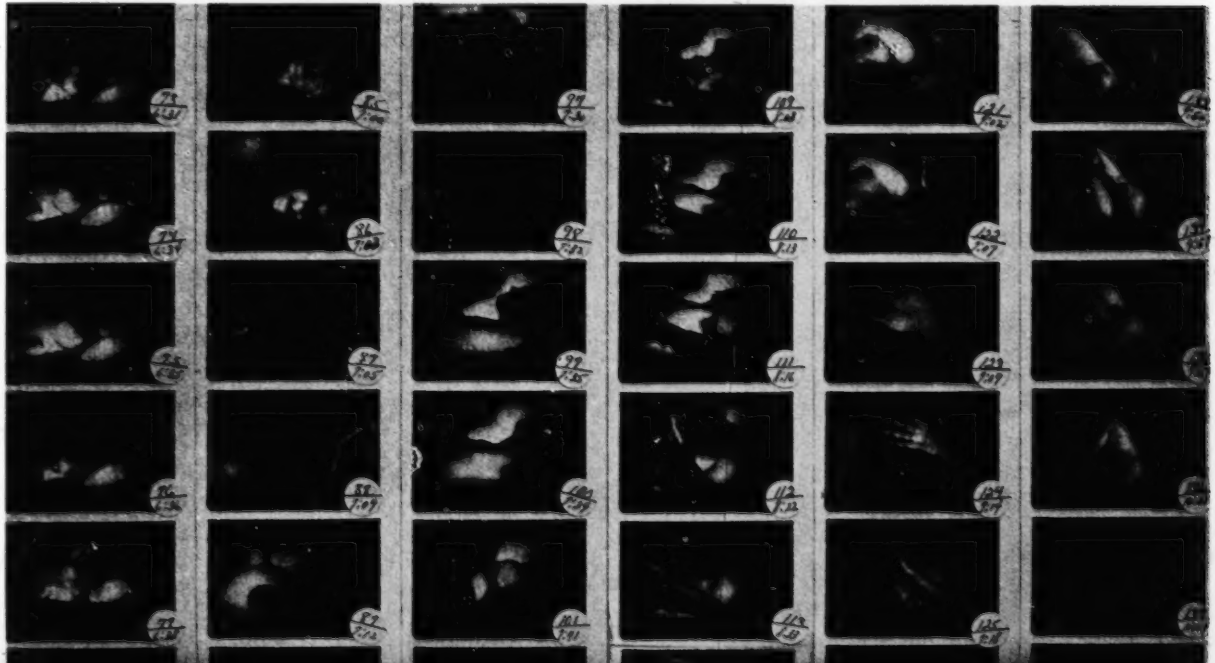
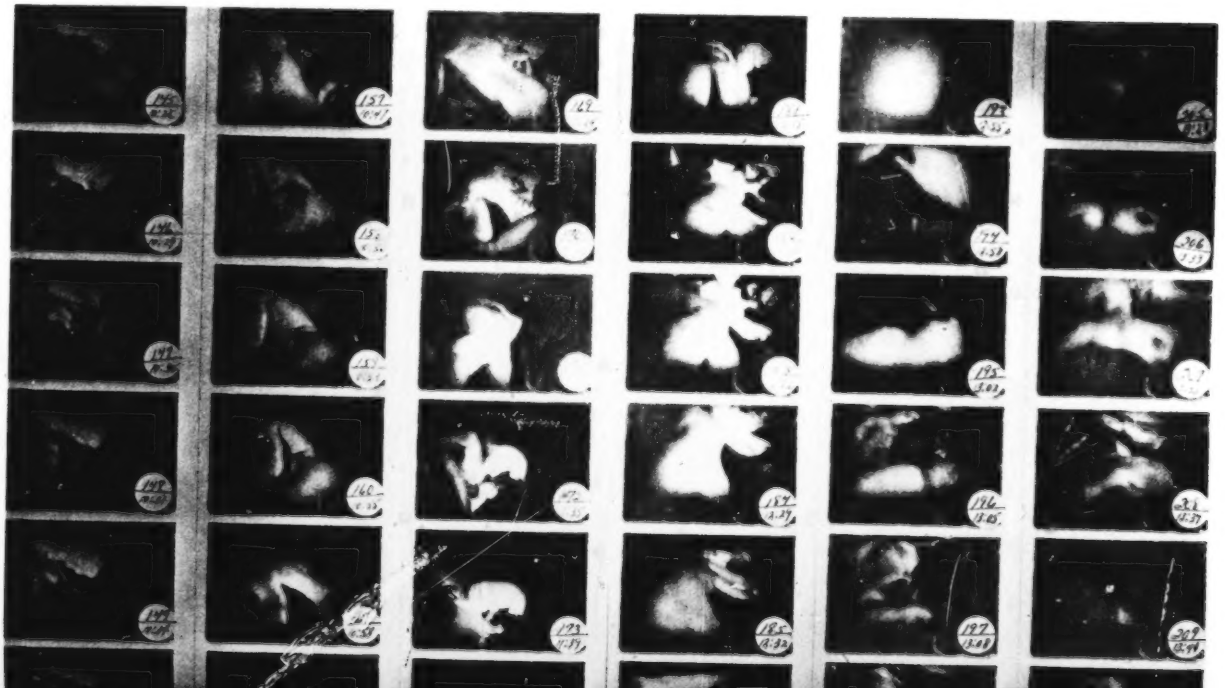


"100 DOLLAR WIFE" - Fellatio 100-111, sexual intercourse 120-122, cunnilingus 124-128

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 3 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

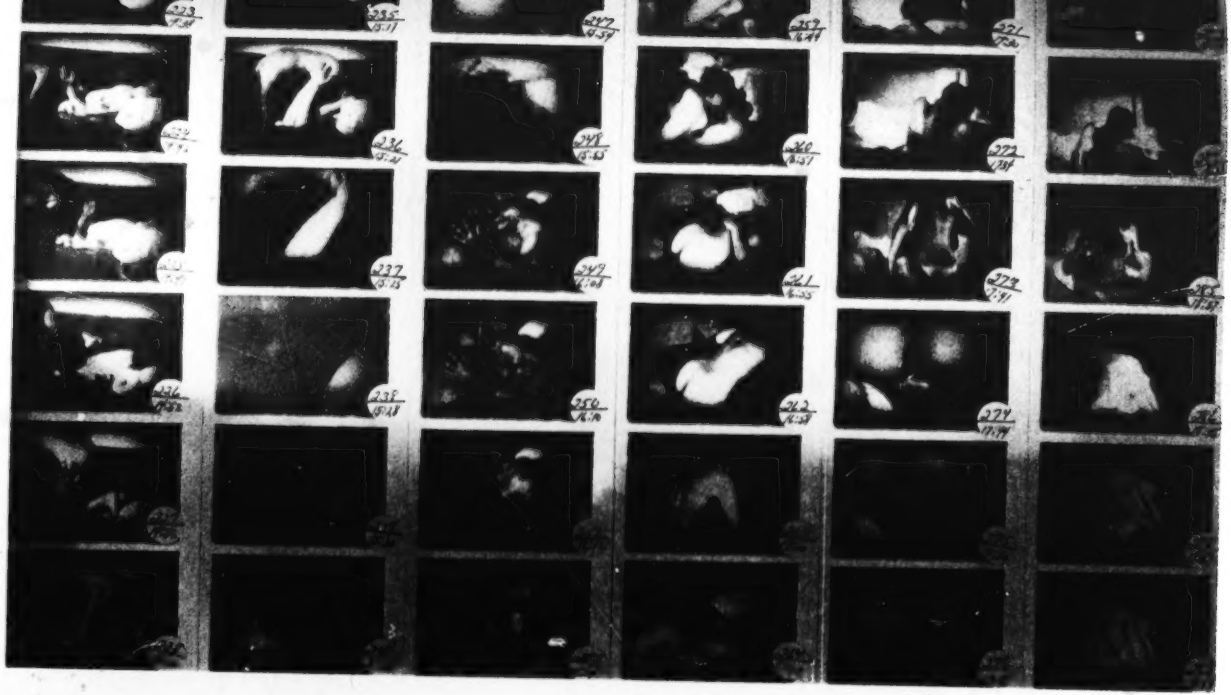


"100 DOLLAR WIFE" - Cunnilingus 145-152, fellatio 182-186, cunnilingus 196-208, 215-216

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 4 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"100 DOLLAR WIFE" - Cunnilingus 217, fellatio 222-224, male & female performing simultaneous fellatio & cunnilingus 228-239, cunnilingus 240-252, sexual intercourse 270-285, male & female performing fellatio & cunnilingus on each other 286-288

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 5 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

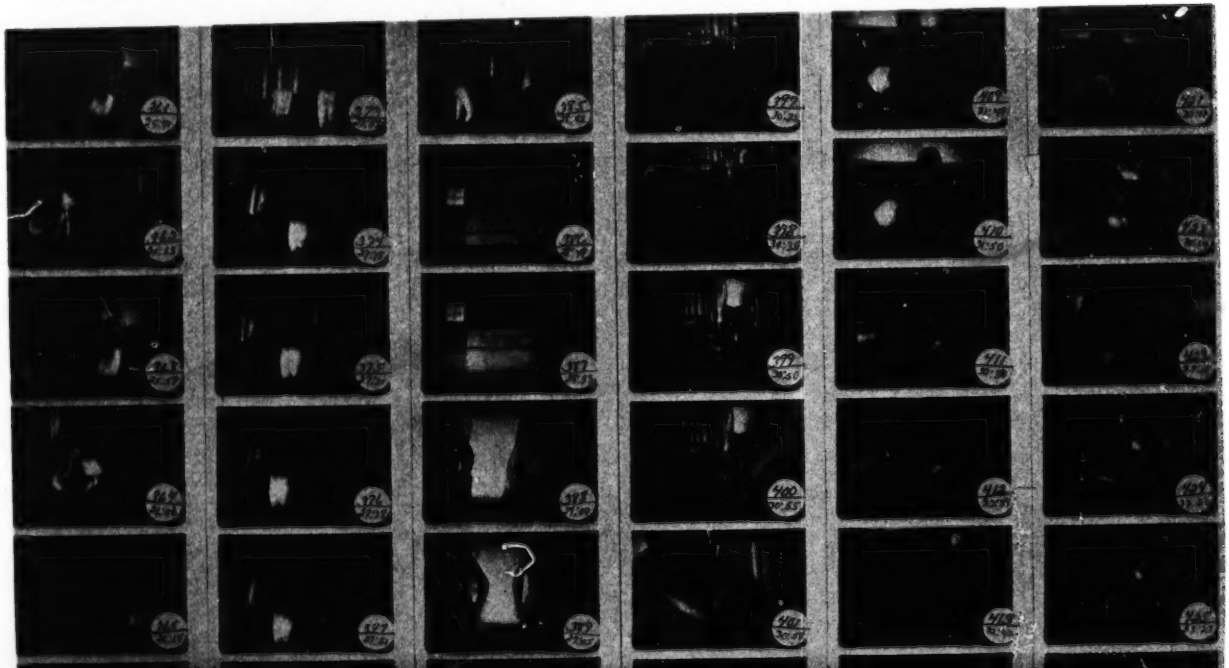
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"100 DOLLAR WIFE" - Sexual intercourse 291-344

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 6 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"100 DOLLAR WIFE" - Lesbianism, cunnilingus (female on female) 401-432

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 7 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"100 DOLLAR WIFE" - Lesbianism, cunnilingus 433-458

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 8 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"100 DOLLAR WIFE" - Sexual intercourse 540-541, cunnilingus 566-568, fellatio 572-576

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 9 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

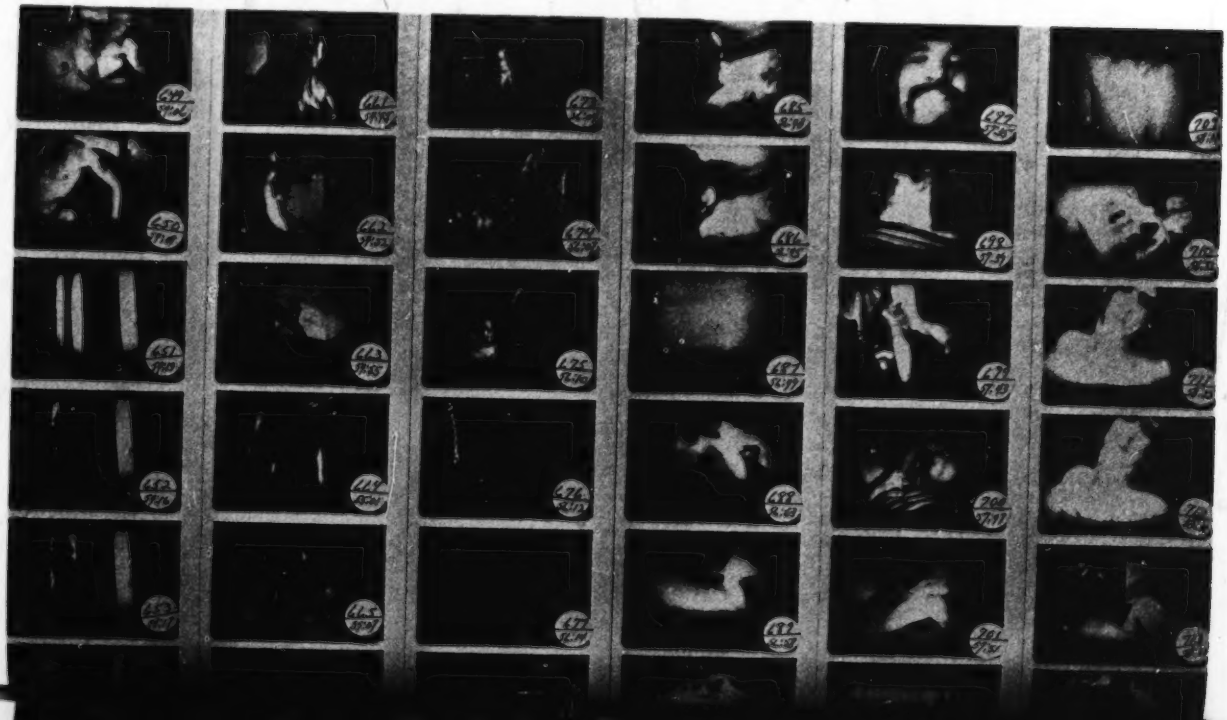
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"100 DOLLAR WIFE" - Fellatio 577, sexual intercourse 579-594, 611-630 (penetration closeup)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 10 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"100 DOLLAR WIFE" - End 678 - Previews 679-720

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 11 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"100 DOLLAR WIFE" - Previews 721-792 (cunnilingus 790-791)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 12 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"MASSAGE PARLOR" - Previews 793-797, "Massage Parlor" title 798-799

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 13 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

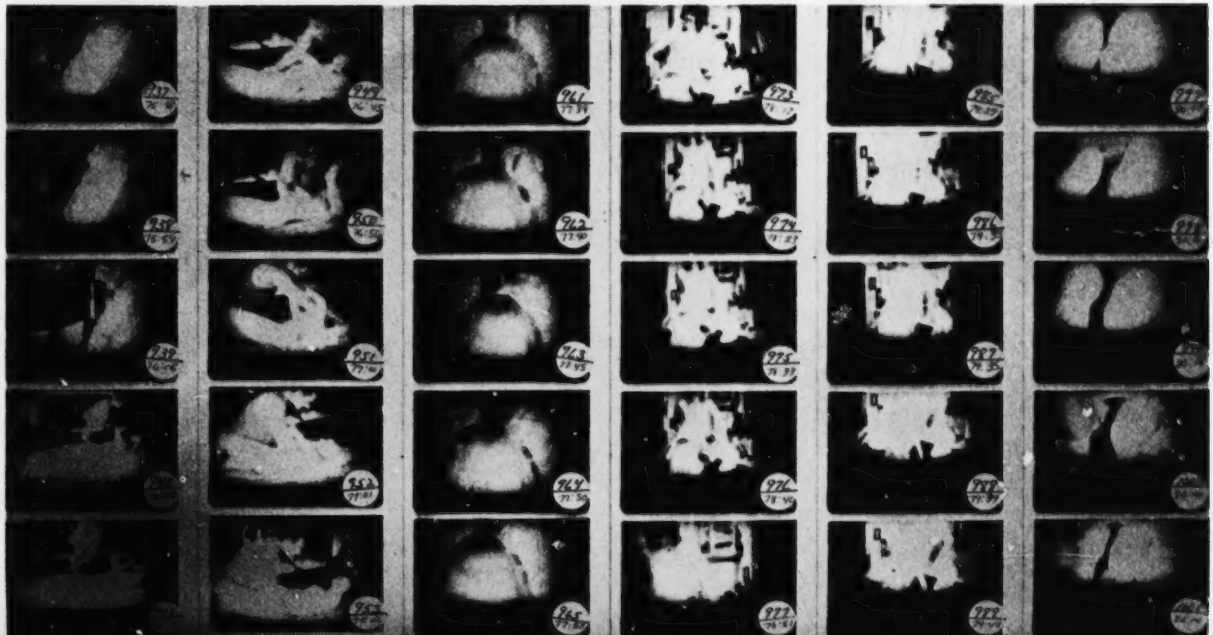
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"MASSAGE PARLOR"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 14 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

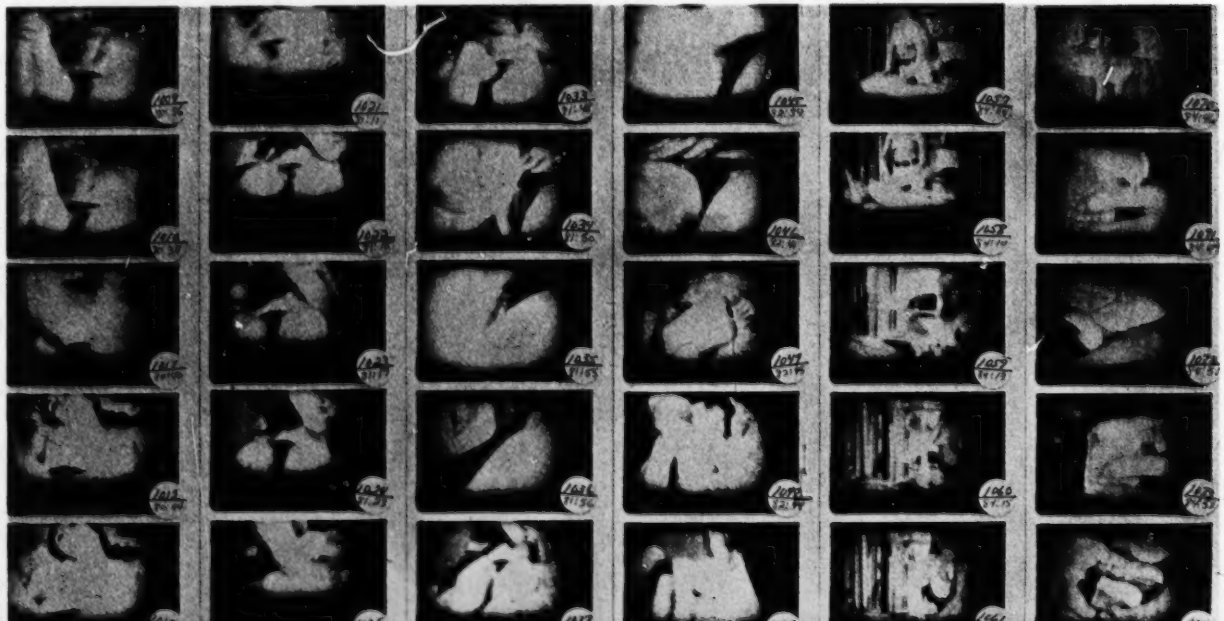


"MASSAGE PARLOR" - Fellatio 956-990

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 15 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

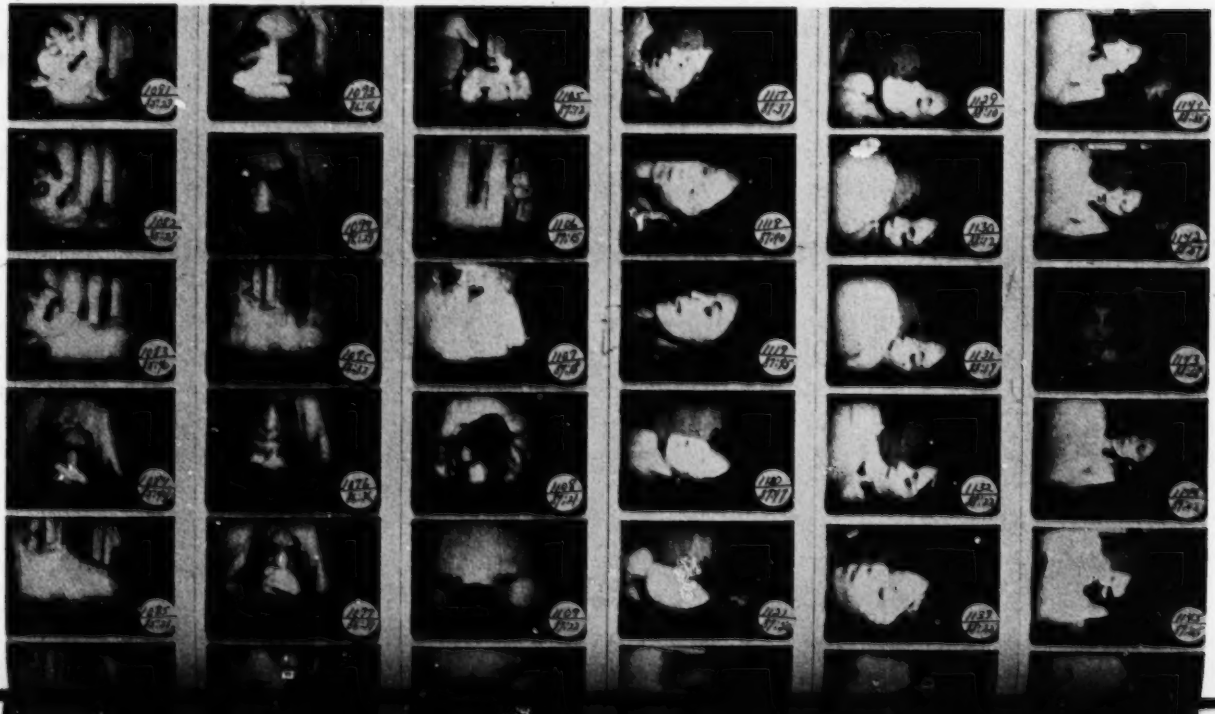


"MASSAGE PARLOR" - Female inserts male penis in hot dog bun & performs fellatio 1059-1080

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 16 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"MASSAGE PARLOR". - Fellatio 1081-1100, cunnilingus 1109-1146

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 17 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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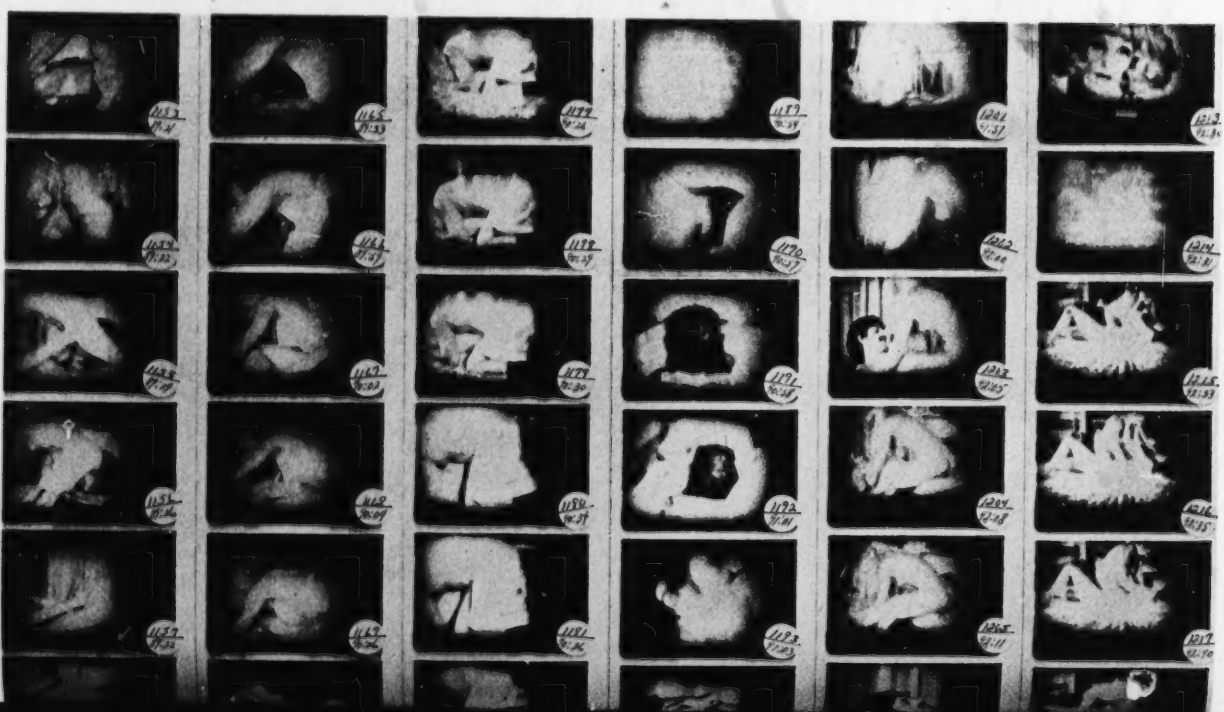

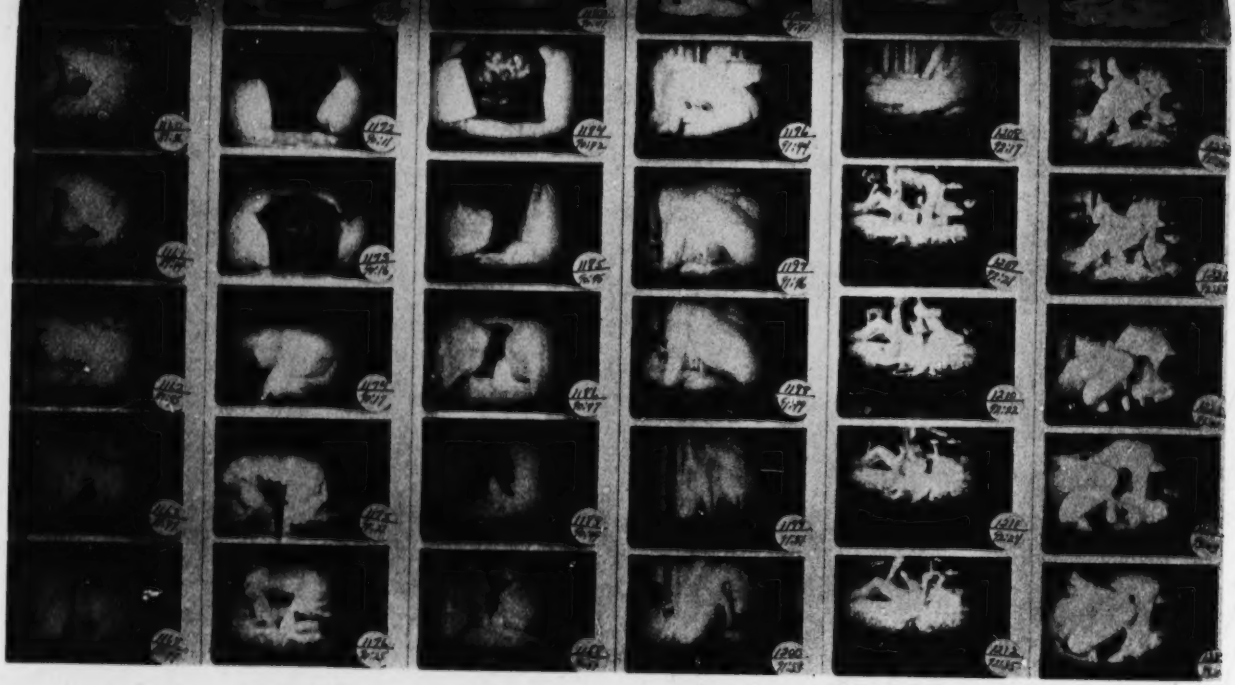

"MASSAGE PARLOR" - Sexual intercourse 1157-1169, male and female perform cunnilingus and fellatio on each other 1170-1192, sexual intercourse 1193-1208, 1219-1224

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 18 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"MASSAGE PARLOR" - Sexual intercourse 1225-1247, 1248-1282, 1287-1296

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 19 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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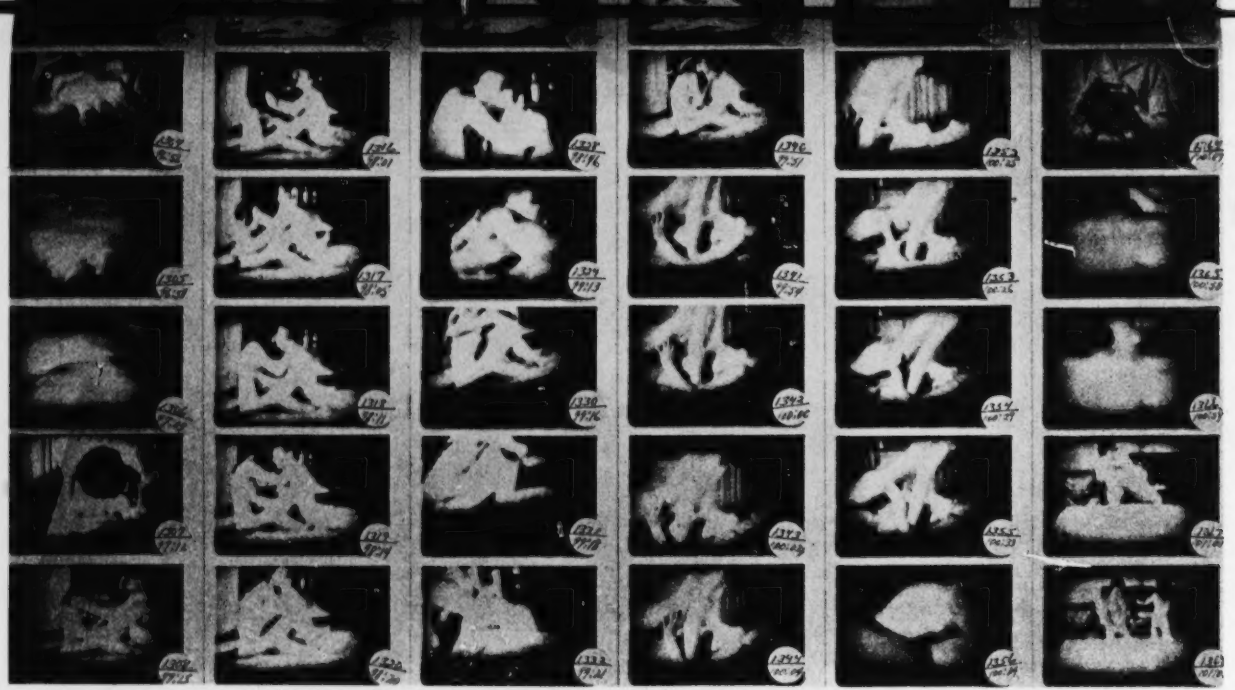


"MASSAGE PARLOR" - Sexual intercourse 1297-1367

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 20 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

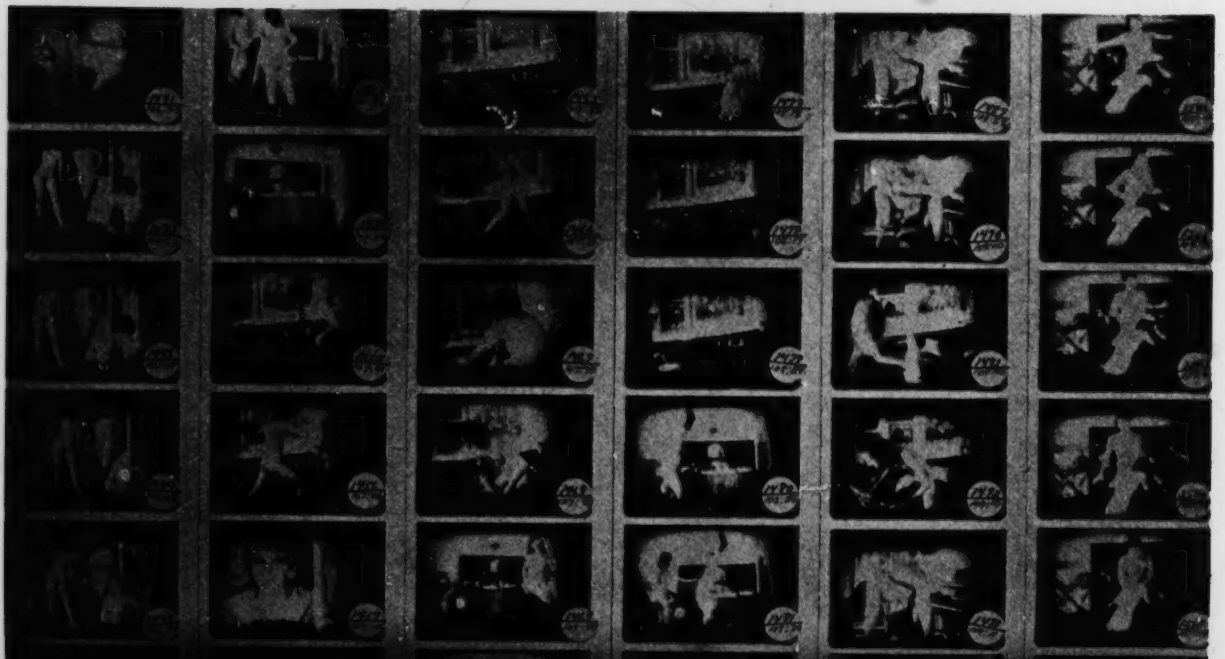
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"MASSAGE PARLOR" - Cunnilingus 1371-1375, group sex (cunnilingus, anal sodomy, etc.) 1417-1440

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 21 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

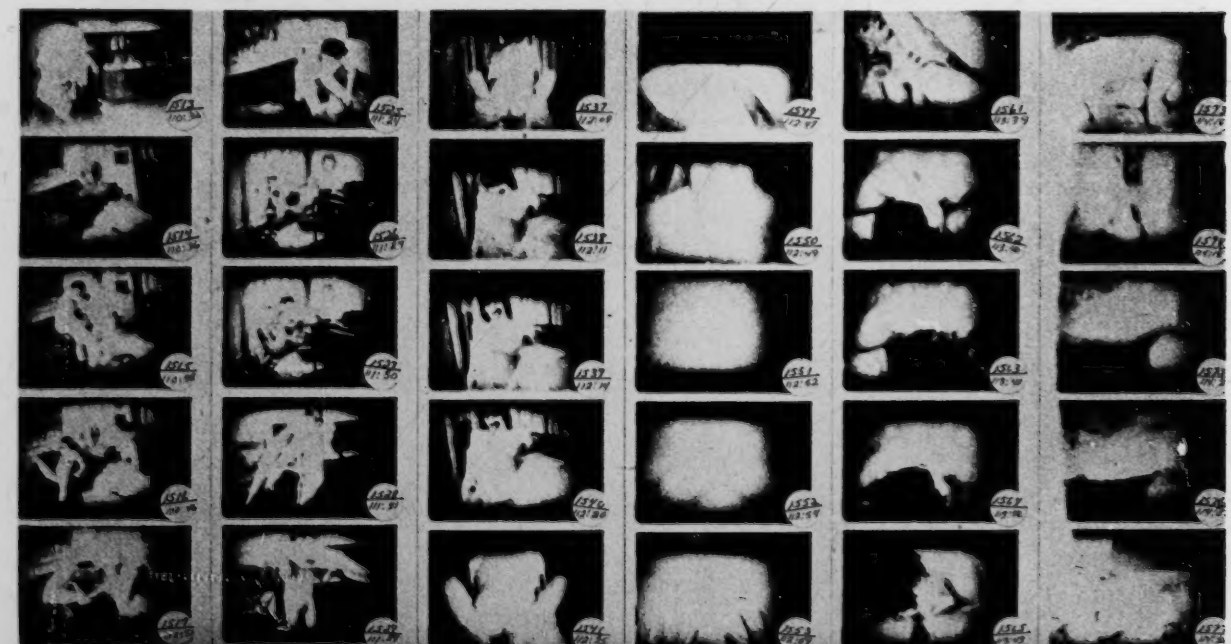


"MASSAGE PARLOR" - Fellatio 1494-1505

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 22 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"MASSAGE PARLOR" - Sexual intercourse 1531-1537, fellatio 1538-1540, sexual intercourse 1541-1543, 1555-1561, cunnilingus 1562-1566, sexual intercourse 1567-1569, cunnilingus, fellatio by male & female 1570-1574, cunnilingus 1577-1578, fellatio 1579-1584

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 23 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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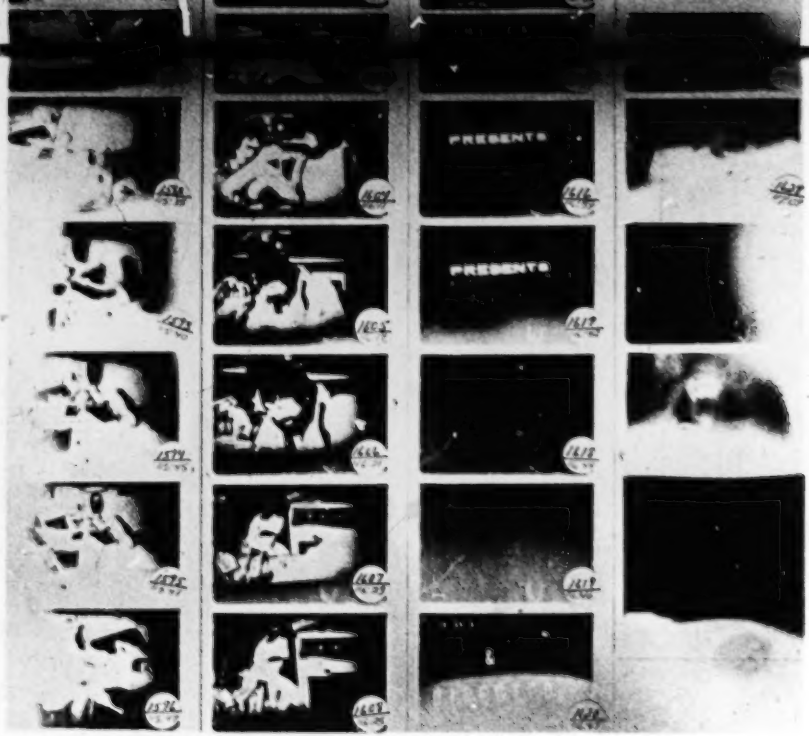


"MASSAGE PARLOR" - End 1612-1613

# APPENDIX S

William H. Dakota v. State of Ohio ex rel Lawrence S. Huffman, C72-445, (a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Order of Judge Walinski on motion to dismiss, sua sponte, as moot.....S3

In conformity with Rule 77(d)F.R.C.P. please take notice that the following order of judgment was entered in this court on Apr. 26, 1973. Dominic J.Gimino,Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO, et rel, LAWRENCE S. HUFFMAN, Respondent, | ) | No. C 72-445 |
| -vs- | ) | OPINION AND ORDER |
| WILLIAM H. DAKOTA, et al. Petitioner. | ) | |

WALINSKI, J:

This cause came to be heard on a motion to dismiss sua sponte as moot.

It appearing to the Court that this Court's opinion in Pursue Ltd. v. Hoffman (C 72-432) (N.D.Ohio, April 20, 1973) has mooted the instant action, it is

ORDERED that this case should be and hereby is dismissed.

(SD) NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio
April 26, 1973

# APPENDIX T

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al. 72 CIV 0326 (a Civil Action in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theatre as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff State of Ohio ex rel Huffman, filed May 1, 1973.....T3-4

Journal Entry, filed May 1, 1973....T5

Subpena Duces Tecum issued May 1, 1973.....T6

T-3

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO ex rel :
LAWRENCE S. HUFFMAN
: CASE NO.
Plaintiff 72 CIV 0326
:
-vs-
: MOTION
WILLIAM H. DAKOTA, et al
: (Filed May 1, 1973)
Defendant

.. .. .. .. .. .. .. .. .. .. ..

Plaintiff says that on October 24, 1972, the Court Ordered the Cinema I Theater, #69 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, lascivious, indecent, or obscene films and that the defendant Robert Smith was personally served a copy of said Order.

Plaintiff says that on November 30, 1972, the Court extended its Order of October 24, 1972, and further permanently enjoined and restrained Robert Smith from conducting said nuisance and said Robert Smith received notice of said Order.

Plaintiff says that Robert Smith has violated the terms of said Orders by exhibiting in said theater on May 1, 1973, obscene motion picture films allegedly entitled "Just Married". "Back Door" and "Bob Dick" which depict numerous scenes of sexual intercourse, cunnilingus, and fellatio.

Wherefore, plaintiff requests that the

Court direct Robert Smith to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obscene and upon such determination to require said Robert Smith to account for the box office receipts derived from the exhibition of such films, and forfeit the same.

(SD) LAWRENCE S. HUFFMAN
Lawrence S. Huffman

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations contained therein are true as he verily believes.

(SD) GARY R. HERMON

(Jurat omitted in printing.)

THE STATE OF OHIO )
ALLEN COUNTY ) SS CERTIFICATE OF COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Motion now on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 7th day of May A.D. 19 73.

(SEAL)

(SD) ROBERT H. DUNLAP
Clerk
By (SD) D.E.WEIDEMAN, Deputy

IN THE COURT OF COMMON PLEAS
OF ALLEN COUNTY, OHIO

STATE OF OHIO ex rel :
LAWRENCE S. HUFFMAN : CASE NO. 72 CIV 0326
:
Plaintiff
: JOURNAL ENTRY
-vs-
:
WILLIAM H. DAKOTA : (Filed May 1, 1973)
et al :
Defendant

.. .. .. .. .. .. .. .. .. .. ..

Upon sworn charges filed with the Clerk of Courts against Robert Smith alleging disobedience of the said Robert Smith to the former Order of this Court directing the non-exhibition of obscene motion picture films at the Cinema I Theater, #69 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said Robert Smith directing him to appear before this Court on May 3, 1973, at 2:00 o'clock P.M., and to bring with him at such time the motion picture films "Just Married" "Back Door" and "Bob Dick" so that a determination might be made as to whether said films are obscene and upon such determination to require said Robert Smith to account for the box office receipts derived from the exhibition of said films and forfeit the same.

(SD) ROBERT M. LIGHT
JUDGE

T-6

SUBPENA DUCES TECUM
CIVIL CASE
Revised Code, Sec. 2137.11-13, 2325.07, 311.17

The State of Ohio, Allen County
Common Pleas Court

To Robert Smith, c/o Cinema I, Lima, Ohio
Projectionist John Doe, c/o Cinema I,
Lima, Ohio

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 3 day of May, A.D. 1973, at 2:00 o'clock P M, to testify as a witness in a certain case pending in said Court, wherein State of Ohio, ex rel Lawrence S. Huffman, Plaintiff, and William H. Dakota, et al, Defendants; and also that you bring with you and produce at the time and place aforesaid

the three motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 1, 1973. and purportedly entitled "Just Married", "Back Door" and "Bob Dick"

and not depart the Court without leave. Herein fail not, under penalty of law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the _____.

WITNESS my hand and the seal of said Court this __ day of ___ 19__

_____
Clerk

By_____ Deputy

## APPENDIX U

William H. Dakota et al v. State of Ohio, ex rel Lawrence S. Huffman, C73-176 (a Removal Action in The United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Petition for Removal, filed May 3, 1973.....U3-8

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Memorandum of Law on Effect of Removal of State Court Action, filed in Allen County Court on May 3, 1973.....U10-12

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Motion for Immediate Hearing and Memorandum in Support Thereof (less App. Exhibits A-F)....U29-33

Affidavit of Deputy Sheriff Fred Hawk re films "Back Door", "Just Married" and "Bob Dick" viewed on May 1, 1973 at Cinema I Theatre.....U34-36

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN,

Respondent,

CIVIL ACTION
C 73-176

-versus-

WILLIAM H. DAKOTA,
et al

(Filed May 3, 1973)

Petitioners.

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of WILLIAM H. DAKOTA, et al., including ROBERT SMITH and OTIS HATFIELD shows:

1.

An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio, entitled STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN, Plaintiff, against WILLIAM H. DAKOTA, and FLORA MAY COLLINS MOOR, and LELAND SAMUEL COLLINS, SARA LEE COLLINS, and PUSSY CAT CORPORATION, and CINEMA I THEATRE and John DOES and Jane DOES, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein, to wit: two evidentiary hearings which resulted in temporary

and permanent injunctions closing Cinema I Theatre.

2.

The above-described action is a civil action which may be removed to this Court by the Petitioners, pursuant to the provisions of 28 U.S.C. §1443, in that Petitioners cannot enforce, in the Courts of the State of Ohio, a right under the Free Speech and Press Provisions of the Constitution of the State of Ohio, in that

(a) Respondent, Plaintiff in the said State Court action, has brought a Petition to close said business, which is the dissemination of sexually explicit materials, which are presumptively protected under the First Amendment to the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only, under controlled circumstances under which the materials are not thrust upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginzburg sense;

(b) Said Complaint of Respondent was based on the allegation in the Respondent's Complaint that the CINEMA I THEATRE, at premises located at 69 Public Square, Lima, Ohio, was a "nuisance;"

(c) On April 20, 1972, this Honorable Court declared Ohio Revised Statutes §3767.06 unconstitutional and enjoined enforcement of same to close CINEMA I THEATRE;

(d) On or about May 1, 1973, Petitioner ROBERT SMITH was served with process directing him to appear in the Court of Common Pleas of Allen County, Ohio, and "bring with him at such time" three motion picture films "so that a determination might be made as to whether said films are obscene;"

(e) On or about May 1, 1973, Petitioner ROBERT SMITH was served with "JOHN DOE" process to appear in the Court of Common Pleas of Allen County, Ohio, the process being similar to that abovementioned.

Said action is also removable pursuant to the provisions of 28 U.S.C. §1443, in that

(a) Petitioners cannot enforce, in the Courts of the State of Ohio, rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has, in the recent past, and is still being utilized by the State of Ohio to curtail the exercise of First Amendment freedom as well as the right against

self-incrimination guaranteed by the Fifth Amendment. The procedures employed by Respondent herein, acting by and through Prosecutor Lawrence S. Huffman of Allen County, will be upheld by the Supreme Court of Ohio, as decided within the past few days. (Exhibit "A")

4.

Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5.

Petitioners show that local prejudices have been so inflamed by the Court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First and Fifth Amendment rights in the Court of Common Pleas of Allen County.

6.

Said action is also removable pursuant 28 U.S.C. §1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C. §1343, to redress deprivation of the civil

rights of Petitioners, to-wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners re-allege their allegations in Paragraph 3(a) and 3(b) and Paragraphs 4 and 5, and incorporate these as Paragraph 6(b) hereof.

7.

Petitioners file herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending against them in the Court of Common Pleas of Allen County, Docket Number 72 CIV-0326 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectfully submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609

GILBERT H. DEITCH, Esquire
Suite 2005, 100 Colony Sq.
1175 Peachtree St., N.E.
Atlanta, Georgia 30361
BY: (SD) TED IORIO
ATTORNEYS FOR PETITIONERS

STATE OF OHIO

COUNTY OF LUCAS

V_E_R_I_F_I_C_A_T_I_O_N

Personally appeared before me, the undersigned, TED IORIO, Attorney for Petitioners herein, and after first being duly sworn, deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information and belief.

(SD) TED IORIO
Ted Iorio

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

State of Ohio, ex rel Lawrence S. Huffman,
Respondent
-vs-
William H. Dakota, et al.,
Petitioners.

Civil Action No. C 73-176

NOTICE OF REMOVAL

(Filed May 3, 1973)

TO:
Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

TO:
Lawrence S.Huffman
Prosecuting Attorney
127 N. Prospect St.
Lima, Ohio, 45802

You, and each of you, are hereby notified that on the 3rd day of May, 1973, William H. Dakota, et al., filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 72-Civ-0326, in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff, vs. William H. Dakota, et al., Defendants.

(SD) TED IORIO
Ted Iorio

Dated this 3rd day of May, 1973.

(Affidavit of Service omitted in printing.)
(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN, | : | CASE NO. 72 CIV-0326 |
| Plaintiff, | : | |
| v. | : | |
| WILLIAM H. DAKOTA, et al, | : | (Filed May 3,1973) |
| Defendant. | : | |

MEMORANDUM OF LAW ON EFFECT OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §1446 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 25 L.Ed. 643 (1881); Flowers v. Aetna Casualty and

Surety Company, 163 F.2d 411, 415 (C.A.6, 1967); Lowe v. Jacobs, 243 F.2d 432 (C.A. 5, 1957); Southern Pacific Company v. Haigt, 126 F.2d 900 (C.A. 9, 1942).

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F.2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F.Supp. 434 (D.C. Texas 1962), aff'd 325 F.2d 206 (C.A. 5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein. (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F.2d 432 (C.A.5,1957).

For the above reasons, defendants having complied with the removal statute,

it is respectfully suggested that this Court no longer has any jurisdiction in this matter and is without power to proceed further.

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Toledo, Ohio 43609
(419) 248-5351

(SD) TED IORIO
TED IORIO, Esquire

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1175 Peachtree
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Atlanta, Georgia
(404) 892-8890

(SD) GILBERT H. DIETCH
GILBERT H. DEITCH, Esquire
ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN | : |
| | CASE NO. |
| | : C 73-176 |
| Respondent | |
| -vs- | : MOTION TO REMAND |
| WILLIAM H. DAKOTA, et al | : |
| | JUDGE YOUNG |
| Petitioners | : (Filed May 14, 1973) |

.. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a case within 28 U.S.C. Section 1343; and

3. This action is barred under the doctrine of res judicata; and

4. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of

the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| THE STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN | : | CASE NO. C 73-176 |
| Respondent | : | MEMORANDUM IN SUPPORT OF |
| -vs- | : | MOTION TO REMAND. |
| WILLIAM H. DAKOTA, et al | : | (Filed May 1[illegible], 1973) |
| Petitioners | : | |

.. .. .. .. .. .. .. .. .. .. ..

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S. C., Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (B).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in

Case #C 72-28 in this United States District Court for the Northern District of Ohio, Western Division, is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films as the local exhibitors choose. They contend that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners' or exhibitors' first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443 reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and diversion embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (Emphasis added.)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Baines v. Denville, 357 F. 2d 756 (4th Circ., 1966).

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed, by the United States Supreme Court, in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case

of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

> 1. That the right . . . is a right under any law providing for . . . equal civil rights, and
>
> 2. That the petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F.2d 595 (7th Circ. 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .

"On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (Citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443(1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the first amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443 (1), and that the reference in Section 1443 (1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the first amendment."

From Peacock, it is obvious that defendants are not within the purview of

Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F.2d 1067, 1070 (4th Cir. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case, pursuant to 28 U.S.C. Section 1443(1) was

that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that

case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq.,

violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiff's action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F.Supp. 281, at 292, and 28 U.S.C., Section 1441(B):

> ". . . The City derives its authority to seek an injunction against this 'nuisance' not from Federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens . . . ."

And in Grove Press, Inc., case, the Court also stated at page 292, the following:

> "Although it is likely that the alleged obscenity of 'I am Curious -- Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy consideration relevant to the removal problem.
>
> "The City's prayer for an injunction in the state court neither

constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this 'nuisance' not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc., v. Prince

George County Cong. of Racial Eq., 221 F.Supp. 541, 544 (D Md., 1963) . . . .

"Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they did not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show that their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising

under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc. v. Flask, 325 F.Supp. 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffman, Case No. C72-432, more specifically, conducting a prior adversary hearing as to obscenity in an effort to enforce the state court injunction which prohibits the exhibition of obscene films at the subject nuisance premises.

Further, respondent contends that petitioners are barred under the doctrine of res judicata from bringing this action utilizing the same grounds for relief as that sought by the same petitioners by a similar action in this Court in Case No. 72-445 which was dismissed by this Court on April 26, 1973. See McLaughlin Bros. v. Hollowell, 228 U.S. 278, 33 S.Ct. 465; Whitcome v. Smithson, 175 U.S. 635, 20 S. Ct. 248; St. Paul & C.R.Co. v. McLean, 108 U.S. 212, 2 S.Ct. 498.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Atty

Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
45802
Telephone: (419) 299-0786
ATTORNEY FOR RESPONDENT

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN, | CASE NO. C 73-176 |
| Respondent | MOTION FOR IMMEDIATE HEARING |
| -vs- | |
| WILLIAM H. DAKOTA et al | (Filed May 10, 1973) |
| Petitioners | |

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Atty
Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
45802
ATTORNEY FOR RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . "

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of

obscene motion picture films at said location.

On April 20, 1973, the Court in Pursue, Ltd. v. Lawrence S. Huffman, et al., Case No. 72-432, held those provisions of Chapter 3767 of the Ohio Revised Code which provided for the literal closure of a premises in which a nuisance has been maintained unconstitutional, and enjoined the defendants therein from executing ONLY that portion of the State court order which provided for closure. (See Exhibit A) The State court injunctions which prohibited the continuation, in effect, the perpetuation of the nuisance, to wit: the perpetuation of the nuisance, to wit: The exhibition of obscene motion picture films, however, remained undisturbed by the federal court order. (See Exhibits B and C).

On April 26, 1973, this Court in State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72-445, dismissed sua sponte the pending removal action thereby returning such case to the jurisdiction of the Allen County, Ohio, Court of Common Pleas. (See Exhibit D).

On May 1, 1973, the plaintiff in the State case filed his verified Motion (See Exhibit E) in the State court requesting an adjudication as to obscenity of the motion picture films being exhibited at the subject nuisance premises. The State Court ordered that such ahearing be conducted on May 3, 1973 (See Exhibit F). The Petition for Removal filed herein on May 3, 1973, forced the cancellation of the State court proceeding by virtue of

its mere filing (whether meritorious or fraudulent) causing the termination of the State court's jurisdiction.

Respondent contends that petitioners are barred under the doctrine of res judicata from bringing a second Petition for Removal. It is elementary that a second petition for removal cannot be made on the same grounds as the first one as is the case here. (See McLaughlin Bros. v. Hallowell, 228 U.S. 278, 33 S.Ct. 465; Whitcomb v. Smithson, 175 U.S. 635, 20 S.Ct. 248; St. Paul & C.R. Co. v. McLean, 108 U. S. 212, 2 S.Ct. 498)

As respondent has argued in prior matters arising out of activities conducted at the subject nuisance premises which have resulted in actions before this Court, the petitioners are flagrantly abusing the federal judicial process urging federal court intervention while continuing their unlawful conduct by exhibiting the crudest imaginable hard core pornographic obscene motion picture films and reaping the profits of this unlawful undertaking by filing actions of the nature presently before the Court. In support of this contention respondent attacks hereto Exhibit G, an affidavit of a law enforcement officer describing the three motion pictures which were to be scrutinized by the State court prior to the filing of the Petition for Removal in this case.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence, and

the matter is pressing. Unless this Court orders an immediate hearing on respondent's motion to remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Gary R. Hermon
Assistant Prosecuting
Attorney

(Certificate of Service omitted in printing.)

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square. Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture films which at the said Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and and actual penetration could be seen of the female vagina.

Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were performed as explicitly as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

(Jurat omitted in printing.)

## APPENDIX V

State of Ohio v. Robert Smith, 73 CR 093 (a Criminal Case filed on May 4, 1973 in the Court of Common Pleas of Allen County, Ohio)

Papers Included in Appendix: Page

Affidavit of Lawrence S. Huffman, filed May 4, 1973.....V3

Motion for Prior Adversary Hearing, filed May 4, 1973.....V4

Affidavit of Deputy Sheriff Fred Hawk re films "Back Door" "Just Married" and "Bob Dick".....V5-7

Journal Entry filed May 4, 1973.....V8-9

Summons for Robert Smith, filed May 4, 1973.....V10-11

Subpena Duces Tecum Re films "Back Door" "Just Married" and "Bob Dick", filed May 4, 1973...V12

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO.
73 CR 093

-vs- :

ROBERT SMITH : AFFIDAVIT

Defendant : (Filed May 4, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and "Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

---

(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :
CASE NO.
Plaintiff : 73 CR 093

vs : MOTION FOR PRIOR ADVERSARY HEARING

ROBERT SMITH :

Defendant : (Filed May 4, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 1, 1973, and purportedly entitled "Back Door", "Just Married" and "Bob Dick".

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Atty
ATTORNEY FOR STATE OF OHIO

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture films while at the Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual

penetration could be seen of the female vagina. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were performed as explicitly as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such

sexual acts.

Further affiant saith not.

---

(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :
CASE No.
Plaintiff : 73 CR 093

-vs- : JOURNAL ENTRY

ROBERT SMITH :
(Filed May 4, 1973)
Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard upon the motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled "Back Door", "Just Married", and "Bob Dick", be conducted at Courtroom # 2 , before one of the Honorable Judges of the Common Pleas Court, on May 7 , 1973, at 1:30 P. M.

(S) ROBERT M. LIGHT
JUDGE

THE STATE OF OHIO )
) SS CERTIFICATE OF
ALLEN COUNTY ) COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct

copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 4th day of May, A.D. 19 73.

(SEAL)

ROBERT H. DUNLAP, Clerk

By D.E.WEIDEMAN, Deputy

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :
CASE NO.
Plaintiff : 73 CR 093

-vs- :
SUMMONS
ROBERT SMITH :
Defendant : (Filed May 4, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and "Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

S/ LAWRENCE S. HUFFMAN

(Jurat omitted in printing.)

Robert Smith must appear in Common Pleas Court on May 7, 1973, at 1:30 P. M., in Courtroom # 2 before one of the Honorable Judges to answer to said Affidavit.

Clerk, Common Pleas Court

By (SD) DONALD E.WEIDEMAN
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

(SD) ROBERT H. DUNLAP

By (SD) DONALD E.WEIDEMAN
Dep.

R E T U R N

Sheriff's Office, Lima, Ohio, _____ 1973.

Received this writ _____ 1973, and on _____ 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon _____

EDWARD L. FAIR, SHERIFF

By _____
Deputy Sheriff

SUBPENA DUCES TECUM
CRIMINAL CASE
R.C. 2317.13; 2935.22
Revised Code, Sec. 2137.11-13, 2325.07, 311.17

The State of Ohio, Allen County, Common Pleas Court

To Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima Ohio

Otis Hatfield, c/o Cinema I Theater, #69 Public Square, Lima Ohio

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the ___ day of May, A.D. 1973, at ___ o'clock ___ M., to testify as a witness in a certain case pending in said court, wherein The State of Ohio Plaintiff and Robert Smith, Defendant; and also that you bring with you and produce at the time and place aforesaid

Three motion picture films purportedly entitled "Back Door" "Just Married" and "Bob Dick" exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio

and not depart the Court without leave. Herein fail not, under penalty of law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the State of Ohio.

WITNESS my hand and seal of said Court this 4th day of May 1973.

(SD) ROBERT H. DUNLAP, Clerk
By (SD) DONALD E. WEIDEMAN
Deputy

## APPENDIX W

Robert Smith v. State of Ohio, C73-180, (a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Petition for Removal, filed May 7, 1973 (Less Exhibits A-6).....W3-7

Notice of Removal, filed May 7, 1973.W8

Memorandum of Law on Effect of Removal on State Court Action, filed with Allen County Common Pleas Court on May 7, 1973.....W9-11

Motion to Remand, filed May 14, 1973.W12-13

Memorandum in Support of Motion to Remand, filed May 14, 1973.....W14-25

Motion for Immediate Hearing, and Memorandum in Support Thereof, filed May 14, 1973.....W26-28

Order of Judge Young Overruling Motion to Remand, filed May 22, 1973.....W29

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO :

Plaintiff : CASE NO. 73CR 093

-vs- :

ROBERT SMITH :

Defendant :

PETITION FOR REMOVAL (Filed May 7, 1973)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of ROBERT SMITH shows:

1.

On or about May 4, 1973, an affidavit was filed in the Court of Common Pleas of Allen County, Ohio, in an action entitled THE STATE OF OHIO VS. ROBERT SMITH, Case No. 73CR 093, the affiant being LAWRENCE S. HUFFMAN, Prosecuting Attorney of Allen County, Ohio. (Affidavit attached hereto as Exhibit A)

2.

The affidavit of the aforesaid alleges that the defendant ROBERT SMITH, did on or about May 1, 1973, exhibit three motion picture films knowing the same to be obscene in violation of Ohio Revised Code, Section 2905.35.

3.

Petitioner was served with a summons to notify him of the above-mentioned allegation and commanding him to appear in the Court of Common Pleas of Allen County, Ohio, on May 7, 1973, to answer said affidavit. (Summons attached hereto as Exhibit B)

4.

Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio, filed a Motion For Prior Adversary Hearing to determine whether the three motion picture films are obscene, with an affidavit in support of his motion. (Motion For Prior Adversary Hearing and Affidavit attached hereto as Exhibit C)

5.

Petitioner, ROBERT SMITH, was served with a subpoena duces tecum to appear as a witness in the case against himself and was further directed to "bring with you and produce at the time and place aforesaid three motion picture films purportedly entitled 'Back Door', 'Just Married', and 'Bob Dick' exhibited at the Cinema I Theater #69 Public Square, Lima, Ohio" (Subpoena Duces Tecum attached hereto as Exhibit D)

6.

The above-described action is a criminal action which may be removed to this Court by the Petitioner, pursuant to the provisions of 28 U.S.C. §1443, in that

Petitioner cannot enforce, in the Courts of the State of Ohio, rights guaranteed him under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

7.

Said action is removable specifically because the procedure employed by respondent herein, acting by and through Prosecutor Lawrence S. Huffman and Gary R. Hermon of Allen County, will be held by the Supreme Court of Ohio, as so ruled most recently, upholding the Court of Appeals of Ohio which decided that an individual can be made to produce a motion picture film notwithstanding his Fourth and Fifth Amendment rights. (Exhibit E)

8.

Petitioner shows that local prejudices have been so inflamed by the Court's action as well as actions and statements of the prosecutor of Allen County, that it will be impossible for him to protect his Fourth and Fifth Amendment rights in the Court of Common Pleas of Allen County.

9.

Said action is also removable pursuant to 28 U.S.C. §1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C.

§1343, to redress deprivation of the civil rights of Petitioner, to-wit, a denial of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioner re-alleges his allegations in Paragraph 6 and 8, and incorporate them as Paragraph 9 (b) hereof.

10.

Petitioner files herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioner prays that the action now pending against him in the Court of Common Pleas of Allen County, Case No. 73CR 093 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectfully submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

GILBERT H. DEITCH, Esquire
Suite 2005, 100 Colony Square
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361
BY: (SD) TED IORIO
ATTORNEYS FOR PETITIONER

STATE OF OHIO )
) SS:
COUNTY OF LUCAS )

VERIFICATION

Personally appeared before me, the undersigned, Ted Iorio, Attorney for Petitioner herein, and after first being duly sworn deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information and belief.

(SD) TED IORIO
Ted Iorio

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio )

Respondent ) Civil Action No. C 73-180

-vs- )

NOTICE OF REMOVAL

Robert Smith )

Petitioner ) (Filed May 7, 1973)

To:
Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To:
Lawrence S. Huffman
Prosecuting Atty
127 N. Prospect St.
Lima, Ohio 45802

You, and each of you, are hereby notified that on the 7th day of May, 1973, Robert Smith filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 73CR 093, in the Court of Common Pleas of Allen County and entitled The State of Ohio, Plaintiff v. Robert Smith, Defendant.

(SD) TED IORIO
Ted Iorio

Dated this 7th day of May, 1973

(Affidavit of Service omitted in printing.)

(Jurat omitted in printing.)

C73-180

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO :

CASE NO. 73 CR 093

Plaintiff, :

v. :

(Filed May 7, 1973)

ROBERT SMITH :

Defendant. :

MEMORANDUM OF LAW ON EFFECT
OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §1446 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 26 L. Ed. 643 (1881); Flowers v. Aetna Casualty and Surety Company, 163 F.2d 411, 415 (C. A. 6, 1967); Lowe v. Jacobs, 243 F.2d 432

(C.A. 5, 1957); Southern Pacific Company v. Haigt, 126 F.2d 900 (C.A. 9, 1942).

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F.2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F. Supp. 434 (D. C.Texas 1962), aff'd 325 F.2d 206 (C.A.5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein. (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F.2d 432 (C.A.5, 1957).

For the above reasons, defendants having complied with the removal statute, it is respectfully suggested that this Court no longer has any jurisdiction in

this matter and is without power to proceed further.

435 S.Hawley St.
Toledo, Ohio
43609
(419) 248-5351

(SD) TED IORIO
TED IORIO, Esquire

Suite 2005
1175 Peachtree
St., N.E.
Atlanta, Georgia
(404)892-8890

(SD) GILBERT H. DEITCH
GILBERT H. DEITCH, Esq.

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO :

CASE NO. C73-180

Plaintiff :

JUDGE DON J.YOUNG

-vs- :

MOTION TO REMAND

ROBERT SMITH : (Filed May 1[illegible], 1972).

.. .. .. .. .. .. .. .. .. .. .. .. ..

Defendant :

Plaintiff respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1441(b); and

3. This action is not a civil action within 28 U.S.C. 1343.

4. Defendants can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Plaintiff further moves the Court for an order directing defendant to pay to

plaintiff all expenses and disbursements incurred by plaintiff by reason of the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce St.
P.O.Box 546, Lima Ohio
45802
Telephone: (419)229-0786
ATTORNEY FOR PLAINTIFF

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO :

Plaintiff : CASE NO. C73-180

-vs- : JUDGE DON J.YOUNG

ROBERT SMITH : MEMORANDUM IN SUPPORT OF MOTION TO

Defendant : REMAND.

.. .. .. .. .. .. .. .. .. (Filed May 14, 1973)

The State of Ohio contends that the Federal District Court lacks jurisdiction in that the bases for removal as set forth in defendant's petition for removal are insufficient.

In his petition, Robert Smith, hereinafter referred to as the defendant, has alleged that this United States District Court has jurisdiction of the case at hand. The defendant contends that this is an action which may be removed to a Federal District Court pursuant to Title 28, United States Code, Section 1441(b) and Title 28, United States Code, Section 1443.

Section 1441 describes actions removeable generally and specifically subsection (b) provides as follows:

> "Any civil (my emphasis) action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties, or laws of the United States, shall be removeable without re-

gard to the citizenship or residence of the parties."

The case which defendant seeks to remove herein is a criminal case. A criminal affidavit has been filed against the defendant charging him with exhibiting obscene motion picture films in contravention of Revised Code 2905.35, a criminal offense, conviction of which may result in fine and imprisonment. Therefore, the action which defendant attempts to remove is a criminal action and not a civil action as required by subsection (b) of section 1441.

The defendant further cites as authority for removal, Section 1443 of Title 28 of the United States Code contending that he cannot enforce in the courts of the State of Ohio rights guaranteed him under the 4th, 5th, and 14th amendments to the Constitution of the United States. While Section 1443 includes both civil actions and criminal prosecutions, the matter pending must be "against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights (my emphasis) of citizens in the United States or for all persons within the jurisdiction thereof."

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. that the right . . . is a right under any law providing for . . . equal civil rights, and

2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F.2d 595 (7th Circ.,1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any

law providing for . . . equal rights' must be construed to mean any law providing for specific civil rights state in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443(1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966) the Supreme Court held that Section 1443(1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443(2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendant is not within the purview of Section 1443(2), and this subsection will

therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1) the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 477 F.2d 1067, 1070 (4th Circ. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole other ground cited by the defendant in his petition for removal of this case

pursuant to 28 U.S.C. Section 1443(1) was that he cannot enforce in the Court of Common Pleas of Allen County, Ohio, his first amendment rights as a citizen of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendant's broad contention that he cannot enforce his first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendant in his petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that he cannot enforce his first amendment rights to freedom of speech in the state courts. Because his petition for removal failed to make any showing whatever that he is being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendant is not entitled to removal of this case pursuant to 28 U.S.C. Section 1443(1).

Finally, this Court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it

was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendant's allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendant also contends that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions ofSection 1441(B), by stating in his petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendant's contention, he claims that enforcement of the Ohio statute Section 2905.35 violates his constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F.Supp. 281, at 292, and 28 U.S.C. Section 1441(b).

In the Grove Press, Inc. case, the Court stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I Am Curious, Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.
>
> "The City's prayer for an injunction in the state courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this 'nuisance' not from federal law, but rather

from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have filed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution. . . Levitt and Sons, Inc. v. Prince George County Cong. of Racial Eq., 221 F.Supp. 541, 544 (D Md., 1963) . . .

"Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where de-

> fendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State Courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C. Section 1441."

In the instant case, the defendant is unable to show that his First Amendment Right has not, is not, or would not be protected in the state courts. Secondly, his mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(b), and that the case should again be remanded to the

state courts for its adjudication.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
45802
Telephone: (419)229-0786
ATTORNEY FOR PLAINTIFF

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO :

CASE NO. C73-180

Plaintiff :

JUDGE DON J. YOUNG

-vs- :

MOTION FOR IMME-

ROBERT SMITH : DIATE HEARING

(Filed May 14, 1973)

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P.O.Box 546, Lima, Ohio
45802
ATTORNEY FOR PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

On May 4, 1973, Lawrence S. Huffman, filed his affidavit in the Court of Common Pleas of Allen County, Ohio, charging Robert Smith with a violation of Revised Code Section 2905.35 for exhibiting obscene motion picture films. (See Exhibit A). At the same time the State of Ohio filed a Motion for Prior Adversary Hearing (See Exhibit B) which the Court ordered be conducted on May 7, 1973. (See Exhibit C).

The Court issued a summons in lieu of an arrest warrant (See Exhibit D) requiring the appearance of defendant in court on May 7,1973.

On the evening of May 7, 1973, the defendant Robert Smith was served the aforementioned summons, affidavit, motion for prior adversary hearing, certified copy of the court order ordering a prior

adversary hearing and a subpoena duces tecum. (See Exhibit E). At the same time, the projectionist of the Cinema I Theater, Otis Hatfield, was served an idential subpoena duces tecum.

On the day of the hearing, Robert Smith filed his petition for removal herein.

The petition for removal filed herein is completely without foundation in law. The statutory authority for such filing as reflected in said petition for removal is wholly without merit as shown in the State's Memorandum in Support of Motion to Remand which is hereby incorporated by reference.

The State of Ohio further submits that this matter was awaiting a prior adversary hearing on the obscenity of the three motion picture films which are the subject of the criminal affidavit and that time is of the essence and the matter is pressing.

Unless this Court orders an immediate hearing on the State of Ohio's Motion to Remand, the State of Ohio's right to have the motion picture films which are the subject of the criminal affidavit declared obscene and proceed in the prosecution thereof will result in substantial prejudice against the State of Ohio.

(Certificate of Service omitted in printing.)

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio, )
)
Plaintiff, ) Civil No. C 73-180
)
vs. ) O R D E R
)
Robert Smith, )
) (Filed May 22, 1973)
Defendant )

---

This cause came to be heard upon motion of the plaintiff for an immediate hearing on its motion to remand this action to the Court of Common Pleas of Allen County, Ohio. For good cause appearing, it is,

ORDERED that the motion of the plaintiff should be and hereby is overruled.

(SD) Don J. Young
United States District
Judge

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this court on MAY 22, 1973.

Dominic J. Cimino, Clerk
Toledo, Ohio.

## APPENDIX X

State of Ohio v. Robert Smith, 73 CR 098, (a Criminal Case, filed on May 8, 1973, in the Court of Common Pleas of Allen County, Ohio)

Papers Included in Appendix: Page

Affidavit of Lawrence S. Huffman, filed May 8, 1973.....X3

Motion for Prior Adversary Hearing, filed May 8, 1973.....X4

Affidavit of Police Officer Dennis Harrod re films "The Wedding" and "Sex And The Working Girl".....X5-6

Journal Entry, filed May 8, 1973.....X7-9

Summons for Robert Smith, filed May 8, 1973.....X10-11

Subpena Duces Tecum re films "The Wedding" and "Sex And The Working Girl".....X12

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY

THE STATE OF OHIO :

Plaintiff : CASE NO.
73 CR 098

-vs- :

AFFIDAVIT

ROBERT SMITH :

(Filed May 8, 1973)

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex And The Working Girl, contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

---

(Jurat omitted in printing.)

X-4

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO. 73 CR 098

-vs- : MOTION FOR PRIOR ADVERSARY HEARING

ROBERT SMITH :

(Filed May 8, 1973)

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and The Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
ATTORNEY FOR STATE OF OHIO

Exhibit A

A F F I D A V I T

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m., on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl",

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and The Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection

and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

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(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO. 73 CR 098

-vs- :

JOURNAL ENTRY

ROBERT SMITH :

(Filed May 8, 1973)

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard upon the appearance of Otis Hatfield, a witness subpoened in this cause by the State of Ohio, and said Otis Hatfield's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Otis Hatfield was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Otis Hatfield to appear on May 10, 1973 at 2:30 p.m., in this cause, and that said subpoena duces tecum did require Otis Hatfield to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield had in his possession, control and custody, two motion picture

films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Otis Hatfield has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Otis Hatfield be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further order of this Court that the said Otis Hatfield can purge himself of such contempt by the production of said motion picture films.

(SD) ROBERT M. LIGHT
JUDGE

STATE OF OHIO, )
) SS: CERTIFICATE OF COPY
ALLEN COUNTY )

ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the

County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF I have hereunto set my hand and seal of said Court at Lima, Ohio, this 15 day of May, A.D. 19 73.

(SEAL)

ROBERT H. DUNLAP, Clerk
(SD) MARJORIE BORNT, Deputy

X-10

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO.
73 CR 098

-vs- :

ROBERT SMITH : SUMMONS

Defendant : (Filed May 8, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Chio.

/S/ Lawrence S. Huffman

(Jurat omitted in printing.)

Robert Smith must appear in Common Pleas Court on May 10, 1973, at 2:30 P. M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By_____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By_____

R E T U R N

Sheriff's Office, Lima, Ohio, ____, 1973.

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon_____
_____
_____.

EDWARD L. FAIR, SHERIFF

By_____
Deputy Sheriff

SUBPENA DUCES TECUM
Criminal Case
Revised Code, Sec. 2945.45

The State of Ohio, Allen County, Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena
Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio
John Doe, c/o Cinema I Theater, #69 Public Square, Lima Ohio

to be and appear before the Common Pleas Court at the Court House in said County, on the 10th day of May A.D., 19 73, at 2:30 o'clock P. M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes Robert Smith; and also to bring with them, and produce at the time and place aforesaid,

two motion picture films purportedly entitled The Wedding, and Sex and The Working Girl which were exhibited at Cinema I Theatre, #69 Public Square, Lima, Ohio, on May 8, 1973;

and not depart the Court without leave. And therein to fail not, under penalty of law; and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State.

WITNESS my hand and the seal of said Court, this 8th day of May, 19 73.

ROBERT H. DUNLAP, Clerk
By (SD) VIRGINIA BELOPAVLOVICE
Deputy

# APPENDIX Y

State of Ohio v. Pursue, Ltd., 73 CR 099, (a Criminal Case, filed on May 8, 1973, in the Court of Common Pleas of Allen County, Ohio)

Papers Included in Appendix: Page

Affidavit of Lawrence S. Huffman, filed May 8, 1973..... Y3

Motion for Prior Adversary Hearing... Y4

Affidavit of Police Officer Dennis Harrod, Re films "The Wedding" and "Sex And The Working Girl"..... Y5-6

Journal Entry, filed May 8, 1973..... Y7-8

Summons for Pursue Ltd., filed May 8, 1973..... Y9-10

Subpena Duces Tecum Re Films "The Wedding" and "Sex And The Working Girl"..... Y11

Memorandum in Support of Service, filed May 10, 1973..... Y12-13

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE No. 73 CR 099 |
| -vs- | : | AFFIDAVIT |
| PURSUE, LTD., a Delaware Corporation | : | |
| Defendant | : | (Filed May 8,1973) |

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl contrary to Section 2905.35 of the Ohio revised Code and against the peace and dignity of the State of Ohio.

---

(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 099 |
| -vs- | : | |
| PURSUE, LTD. A Delaware Corporation | : | MOTION FOR PRIOR ADVERSARY HEARING |
| Defendant | : | (Filed May 8, 197 |

.. .. .. .. .. .. .. .. .. .. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and the Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted

Gary R. Herman, Assistant Prosecuting Attorney
ATTORNEY FOR STATE OF OHIO

Exhibit A

A F F I D A V I T

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m. on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl",

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and the Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male

penis was observed in a state of erection and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

---

(Jurat omitted in printing.)

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO. 73 CR 099

-vs-

PURSUE, LTD. : JOURNAL ENTRY

A Delaware Corporation :

Defendant (Filed May 8, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard on the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled The Wedding, and Sex and the Working Girl, be conducted at Courtroom # 2 , before one of the Honorable Judges of the Common Pleas Court, on May 10 , 1973, at 2:30 M.

(SD) ROBERT M. LIGHT
JUDGE

THE STATE OF OHIO )
) SS CERTIFICATE OF
ALLEN COUNTY ) COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office

(SEAL)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 8th day of May A.D. 19 73

ROBERT H. DUNLAP, Clerk

(SD) (Illegible) Deputy

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO.
/3 CR 099

-vs- :

SUMMONS

PURSUE, LTD., a Delaware Corporation : (Filed May 8, 1972)

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO

You are hereby commanded to notify Pursue, Ltd., a Delaware Corporation, that it has had an affidavit filed against it by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and The Working Girl, contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

(Jurat ommitted in printing.)

/S/ LAWRENCE S. HUFFMAN

Pursue, Ltd., a Delaware Corporation, must appear in Common Pleas Court on May 10, 1973, at 2:30, P. M., in Courtroom #2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By_____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By _____

R E T U R N

Sheriff's Office, Lima, Ohio, _____,1973

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof with the endorsements thereon

_____

_____

_____

EDWARD L. FAIR, SHERIFF

By_____
Deputy

Y-11

SUBPENA DUCES TECUM
Criminal Case
Revised Code, Sec. 2945.45

The State of Ohio, Allen County, Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena
Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio
John Doe, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

to be and appear before the Common Pleas Court at the Court House in said County, on the 10th day of May A.D. 19 73 at 2:30 o'clock P. M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes Pursue, Ltd., a Delaware Corporation; and also to bring with them, and produce at the time and place aforesaid

two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl, which were exhibited at Cinema I Theatre, #69 Public Square, Lima, Ohio, on May 8, 1973.

and not depart the Court without leave. And therein to fail not, under penalty of law; and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State.

WITNESS my hand and the seal of said Court this ___ day of May 19 73.

ROBERT H. DUNLAP, Clerk

By (SD) VIRGINIA BELOPAVLOVICH
Deputy

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 099 |
| -vs- | : | |
| | | MEMORANDUM |
| PURSUE, LTD. | : | |
| | | (Filed May 10, 1973) |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

The following Memorandum of Law is submitted to the Court on the oral motion of the defendant, Pursue, Ltd., to quash service of process upon the defendant, Pursue, Ltd.

It is the position of the State of Ohio that service of summons upon a corporation shall be made as provided for service of summons upon corporations in civil actions.

Rule 4.2 of the Ohio Rules of Civil Procedure, subparagraph 6 provides that a corporation may be served by several methods, one of which is by serving a managing or general agent of the corporation. The return made by the Deputy Sheriff serving the summons upon Pursue, Ltd., reflects that said summons was served upon Robert Smith, agent of Pursue, Ltd.

It would appear to the State of Ohio that if such service of process is to be challenged, itis incumbent upon the defendant to show by way of evidence that Robert Smith is not an agent of said

corporation. The record on its face reflects proper service in accordance with Rule 4.2 of the Ohio Rules of Civil Procedure. The State of Ohio contends that to avoid process, the defendant must show that he is not the agent of Pursue, Ltd. The State has abundant evidence to the contrary.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P.O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR STATE OF OHIO

(Certificate of Service omitted in printing.)

# APPENDIX Z

State of Ohio v. Robert Smith, 73 CR 098, (a Criminal Case filed on May 8, 1973, in the Court of Common Pleas at Allen County, Ohio)

Papers Included in Appendix: Page

Journal Entry, filed May 11, 1973 of Contempt Citation Against Robert Smith.....Z3-5

Journal Entry, filed May 11, 1973 of Contempt Citation against Otis Hatfield.....Z6-8

Robert Smith and Otis Hatfield v. Edward Fair, Sheriff of Allen County, Ohio, C73-187 (a Petition for Habeas Corpus in the Federal District Court for the Northern District of Ohio, Western Division)

Order of Federal Judge Young, filed May 11, 1973, Admitting Smith and Hatfield to Bail.....Z9

Content of Petition for Writ of Habeas Corpus, received by phone on May 15, 1973.....Z10-12

Answer of Sheriff Fair, filed May 16, 1973.....Z13-14

Memorandum in Support of Right of Law Enforcement to Require Production of Films (less Exhibits A-H).....Z15-20

APPENDIX Z CONT'D

Page

State Court Docket in 72 CIV 0326....Z21-24

Federal Docket in 72 C 384.....Z25

Federal Docket in 72 C 432.....Z26-27

Federal Docket in 72 C 445.....Z28

Federal Docket in 73 C 176.....Z29

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 098 |
| -vs- | : | |
| ROBERT SMITH | : | JOURNAL ENTRY |
| Defendant | : | (Filed May 11, 1973) |

.. .. .. .

films purportedly entitled "The Wedding" and "Sex and the Working Girl which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Robert Smith has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Robert Smith's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Robert Smith be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Robert Smith can purge himself of such contempt by the production of said motion picture films.

(SD) ROBERT M. LIGHT
JUDGE

THE STATE OF OHIO )
) SS CERTIFICATE OF
ALLEN COUNTY ) COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid

County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in the Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and State at Lima, Ohio, the 15th day of May, A.D. 19 73.

(SEAL)

ROBERT H. DUNLAP, Clerk

(SD) MARJORIE BORNT, Deputy

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff : CASE NO.
73 CR 098

-vs- :

JOURNAL ENTRY

ROBERT SMITH :

Defendant : (Filed May 11, 1973)

.. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard upon the appearance of Otis Hatfield, a witness subpoened in this cause by the State of Ohio, and said Otis Hatfield's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Otis Hatfield was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Otis Hatfield to appear on May 10, 1973 at 2:30 p.m., in this cause and that said subpoena duces tecum did require Otis Hatfield to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield had in his possession, control and custody, two motion picture

films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Otis Hatfield has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10,1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Otis Hatfield be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Otis Hatfield can purge himself of such contempt by the production of said motion picture films.

(SD) ROBERT H. LIGHT
JUDGE

THE STATE OF OHIO )
ALLEN COUNTY ) SS CERTIFICATE OF COPY
)

I ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that

the foregoing is a true and correct copy of the original Journal Entry now on file in the Clerk's office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said County at Lima, Ohio, the 15 day of May, A.D. 19 73.
ROBERT H. DUNLAP, Clerk

By _____
Deputy

IN THE FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| Robert Smith and Otis Hatfield<br><br>Petitioners<br><br>-vs-<br><br>Edward Fair, Sheriff of Allen County, Ohio<br><br>Respondent | ) | No. C 73-187<br><br>O R D E R<br><br>(Filed May 11, 1973) |

Upon motion of Petitioners' counsel and for good cause shown,

IT IS HEREBY ORDERED that Petitioners be admitted to bail with surety in the amount of $1,000 as to each petitioner. (INITIALS "Per NJ - DYH)

IT IS FURTHER ORDERED THAT Respondent herein be immediately notified of this order and a hearing be set immediately to determine the merits herein.

(SD) DON J. YOUNG
JUDGE

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on May 11, 1973.

Dominic J. Cimino, Clerk

The petition of Robert Smith and Otis Hatfield on behalf of counsel respectfully shows:

1. Petitioners make application herein for a Writ of Habeas Corpus in that they are unlawfully detained and restrained of their liberties by Edward L. Fair and they are now in the custody of the said Edward Fair in the Allen County, Ohio Jail.

2. The Cause or pretext of such detention and restraint is contempt of court in the Court of Common Pleas of Allen County, Ohio, for failure to comply with subpoena duces tecum (attached hereto is Exhibit A). The said judgment of contempt was entered by the Honorable Robert M. Light, Judge of the Court of Common Pleas of Allen County, Ohio. The Court having imposed a jail sentence of ten days or until petitioners purged themselves by complying with said subpoena duces tecum. The date of imposition of sentence was May 10,1973. No written journal entry has been docketed as of the date of this petition. Petitioners were represented by Lawrence Sturtz, Esq. Room 1180, 88 East Broad Street, Columbus, Ohio 43215.

3. Said detention and restraint is unlawful in that petitioners' constitutional rights under the 5th and 14th amendment of the Constitution of the United States have been violated in that the State Court failed to recognize petitioners' rights under due process of law and right against self incrimination.

4. Petitioners have no adequate remedy of law in the State of Ohio in that habeas

corpus in the State Court will not lie from a judgment of contempt, said being reviewed only by appeal and the Supreme Court of Ohio has in effect approved the procedures employed against petitioners in direct contravention of their constitutional rights. (See Exhibit B, State of Ohio vs. Robert Boyd, S.C.#73-183, thereby affirming the Allen County Court of Appeals).

5. (A) On May 8, 1973, the State of Ohio, by Lawrence S. Huffman, filed an affidavit alleging that the petitioner, Robert Smith, exhibited obscene material in violation of Ohio Revised Code, Section 2905.35 (See Exhibit C).

(B) On the same date, motion for a prior adversary hearing, with affidavit in support thereof, was filed by Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio. (See Exhibit D) On the same date a summons was issued notifying the petitioner, Robert Smith, that an affidavit had been filed against him. (See Exhibit E). On the same date, subpoena duces tecum was issued by the Clerk of Courts directed to Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio, (See Exhibit F) and was served upon petitioner, Robert Smith, and petitioner Otis Hatfield.

On May 10, 1973, the "Prior Adversary hearing" came on to be heard before the Honorable Judge Robert M. Light, at which time the petitioners were declared to be in contempt of Court for failure to comply with the subpoena duces tecum served upon them as heretofore mentioned.

Upon oral motion of counsel, Lawrence Sturtz, for bond, the Court refused the same.

No application for this writ has heretofore been made to any other court or judge.

WHEREFORE, petitioners pray that a Writ of Habeas Corpus be issued to Edward Fair, Sheriff of Allen County, Ohio, commanding him to produce the persons of petitioners before this Court at a time and place set and to show cause if he has any why he so illegally is holding them in restraint of their liberties and in the meantime bail be fixed in accordance with the pleadings herein presented.

verification

certification of service.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| ROBERT SMITH and OTIS HATFIELD | : | CASE NO. C73-187 |
| Petitioners | : | |
| -vs | | ANSWER |
| EDWARD FAIR, Sheriff of Allen County, Ohio | : | (Filed May 16, 1973) |
| Respondent | : | |

STATE OF OHIO
SS:
ALLEN COUNTY

Edward L. Fair, being first duly sworn, says that he is the Sheriff of Allen County, Ohio; that on May 10, 1973, he placed in custody and under restraint the petitioners, Robert Smith and Otis Hatfield pursuant to the Order of the Court of Common Pleas of Allen County, Ohio, certified copies of which are attached hereto and incorporated by reference; that the bodies of the said Robert Smith and Otis Hatfield cannot be produced by affiant at the hearing hereof for the reason that the said Robert Smith and Otis Hatfield were ordered admitted to bail on May 11, 1973, in Case No. C73-187 in the United States District Court, Northern District of Ohio, Western Division, entitled Robert Smith and Otis Hatfield, petitioners, vs. Edward Fair, Sheriff of Allen County, Ohio, respondent, and were thereby released from custody and restraint at ____ p.m., May 11, 1973.

Further affiant saith not.

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(Jurat omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| ROBERT SMITH and OTIS HATFIELD | : | CASE NO. C73-187 |
| Petitioners | : | JUDGE NICHOLAS J. WALINSKI |
| -vs- | : | |
| EDWARD FAIR, Sheriff of Allen County, Ohio | : | MEMORANDUM |
| Respondent | : | |

.. .. .. .. .. .. .. .. .. .. ..

FACTS

On May 8, 1973, Robert Smith and Otis Hatfield were each issued an identical subpoena duces tecum (See Exhibit A) requiring that they produce at a prior adversary hearing on May 10, 1973, two motion picture films exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, and purportedly entitled "The Wedding" and "Sex and the Working Girl".

On May 10, 1973, both failed to bring the films subpoened. During the course of the hearing, the State Court found both to be in contempt of court for their respective disobediences to Court process. (See Exhibits B and C).

ISSUE

Can a defendant and/or witness be compelled to produce at a prior adversary

hearing by way of a subpoena duces tecum an allegedly obscene motion picture film?

DISCUSSION

The United States District Court, Northern District of Ohio, Western Division, has consistently held that before an allegedly obscene motion picture film can be seized, it must first be scrutinized by a magistrate in a prior adversary hearing. This was the ruling by the Court in Boyd v. Huffman, Case No. 70-296, and as recently as April, 1973, in Pursue, Ltd. v. Huffman, Case 72-432.

If, then, an allegedly motion picture film cannot be seized for evidence purposes as an incident to an arrest or pursuant to a search warrant without a prior adversary hearing, by what means did the Court contemplate that such film could be viewed in a prior adversary setting? The Court expressed in correspondence to the Prosecuting Attorney of Allen County, Ohio, Lawrence S. Huffman, the means by which films could be produced. (See Exhibit D). Indeed, when Mr. Huffman issued a subpoena duces tecum for the allegedly obscene motion picture film which was the subject of the aforementioned letter and which resulted in contempt proceedings for such issuance, the Court again approved the use of a subpoena duces tecum to compel production of the film in question. (See Exhibit E).

In addition to the reasons and citations of law given by this Court in Judge Young's opinion attached, there appears to be abundant authority that a subpoena

duces tecum is the proper vehicle to require production of an allegedly obscene motion picture film.

Of course, the most obvious logical reason is that the Supreme Court of the United States, when holding that obscenity was outside the scope of First Amendment protection and, generally, laws regulating obscenity were, therefore, constitutional in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, and many later cases, could not have contemplated the creation of unlawful conduct for which there is no constitutional means of enforcement. If law enforcement officials cannot seize an allegedly obscene film for evidence purposes either as an incident to an arrest or pursuant to search warrant without a prior adversary hearing and cannot constitutionally compel production of such film at such hearing, then obscenity laws regulating exhibition of obscene material, although constitutional, are constitutionally unenforceable.

"The privilege against self-incrimination relates only to a compulsory oral examination, or the equivalent thereof, of an accused person either before or on trial; it does not protect against other forms of examination. It protects him from being required to incriminate himself by speech or the equivalent of speech, such as written statements or confessions or actions which the accused might use in place of words for the purpose of intending to communicate an idea." 21 Am Jur 2d Criminal Law, Section 354. This construction of the Fifth Amendment has permitted the compulsory taking of blood, handwrit-

ing exemplars, voice prints, etc.

In the instant case, the State seeks compulsory production of films, not testimony or incriminating speech. The State seeks production of something intangible, to wit: a film, much like the State could seek production of a handwriting exemplar in a forgery case.

Respondent anticipates that petitioners will attempt to analogize and contend that since an accused cannot be compelled to produce private papers or documents that may contain incriminating evidence citing Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524, he cannot be compelled to produce films. The distinctions are obvious. First, a man's private papers are often in his own hand and are merely his oral utterances or speech on paper. Second, a man's private papers are just that, private, not voluntarily opened to public scrutiny.

These distinctions were apparent to the Arizona Supreme Court in Anderson v. Coulter, 499 P 2d 103. A copy of the well-reasoned opinion of Anderson v. Coulter, supra, is attached and marked Exhibit F.

Failure to obey a subpoena duces tecum which required production of allegedly obscene material was recently the subject of a recent United States Supreme Court decision. In Silvers v. Dowling, Case No. 72-871, United States Supreme Court, one Shurgin was issued a subpoena duces tecum for two allegedly obscene films at a hearing scheduled to determine whether an earlier issued injunction en-

joining Shurgin from exhibiting obscene material had been violated. Upon advice of his counsel, Silvers, Shurgin refused to obey the order. Upon the representation of Silvers that the two films in question would be made available at a later hearing, the trial court recalled an attachment for Shurgin previously issued by the Court. At the scheduled hearing Silvers announced to the Court that he was unable to produce the films in question. The trial court found Silvers in contempt of court which judgment was eventually appealed to the United States Supreme Court. The U. S. Supreme Court in Silvers v. Dowling, supra, in a per curiam decision dismissed the appeal. A copy of the appellee's brief and announcement of the Supreme Court's dismissal are attached hereto and marked Exhibits G and H, respectively.

In conclusion, respondent respectfully submits that on the basis of earlier decisions of this Court as to the use of a subpoena duces tecum, the well reasoned rationale of Anderson v. Coulter, supra, the historical application of the Fifth Amendment to speech only, and the unreasonable and oppressive result if this Court should, after ordering law enforcement officials to conduct prior adversary hearings, conclude that the only means by which such a hearing could be conducted is violative of petitioners' rights under the Fifth Amendment, petitioners' application for a Writ of Habeas Corpus Should be denied.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce St.
P.O.Box 546, Lima, Ohio
Telephone: (419)229-0786
ATTORNEY FOR RESPONDENT

(Certificate of Service omitted in printing.)

Z-21

# APPEARANCE AND EXECUTION Docket CIVIL—2 72CIV0326

| NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION |
|---|---|---|
| State of Ohio, ex rel.<br>Lawrence S. Huffman<br>127-129 North Pierce Street<br>Lima, Ohio<br>-vs- Plaintiff<br>William H. Dakota<br>2650 West Market Street<br>Lima, Ohio<br><br>Flora May Collins Moor<br>104 South Dale Drive | Lawrence S. Huffman<br>Gary Bermon | Injunction<br><br>Judge Light |

| DATE | NO. | PLEADINGS FILED, WRITS ISSUED, WRITS RETURNED AND COPIES OF RETURN | |
|---|---|---|---|
| Lima, Ohio<br><br>Leland Samuel Collins<br>Address Unknown<br><br>Sara Lee Collins<br>Address Unknown<br><br>Pussy Cat Corporation<br># 69 Public Square<br>Lima, Ohio<br>or<br>Los Angeles, California<br><br>Cinema I. Theatre<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 1(John Brownell)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 2(Robert Smith, aka Sisson)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio | John Doe # 3 (Allen R. Brown)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 4<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 5<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>Jane Doe # 1 (Geraldine Scott)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>Jane Doe # 2<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>Defendants | William C. Russell, indiv.-James C. and as Guardian of Bruce L. Blair and Corrine E. Russell<br>2722 233rd Street<br>Torrance, California 90505<br><br>Edward L. Russell<br>17 LaCuesta Drive<br>San Rafael, California 94901<br>Michael E. Russell<br>17 LaCuesta Drive<br>San Rafael, California 94901<br>Patricia L. Fitzgerald<br>3701 Divisadero, Apt. No. 107<br>San Francisco, California<br>Irene C. Russell<br>494-C Calle Cadiz<br>Laguna Hills, California 92653<br><br>Party-Defendants |

1972 Sept. 18 1 Complaint filed.
" 18 2 Motion for temporary injunction filed.
" 18 3 Notice of Hearing filed.
" 18 4 Request for Personal Service filed.
" 18 Subpena issued.
" 18 Summons together with copy of complaint,motion and notice issued to the Sheriff of Allen County, Ohio,for personal service upon William H. Dakota,2650 West Market St., Lima, Ohio; and Cinema I. Theatre,by serving William H. Dakota,the manager,# 69 Public Square, Lima, Ohio.

" 18 Summons together with copy of complaint,motion,notice issued to the Sheriff of Allen County, Ohio,for personal service upon Flora Mary Collins,Moor, 104 S. Dale Dr., Lima, Ohio; and John Doe # 1,John Doe # 2,John Doe # 3,Jane Doe # 1.

" 20 5 Amended Complaint filed.
" 20 6 Affidavit for service by publication filed.
" 20 7 Request for service filed.
" 20 Summons together with copy of complaint,motion,notice and amended complaint mailed by certified mail;return receipt requested to the defendants, Elvera Leland Samuel Collins, 510 River St. R.D. # 2,Madison, Ohio 44057; and Sara Lee Collins (Wallace) 1338 Monticello Blvd.,North,St. Petersburg, Florida 33073. Postage ($.736-$1.46).

" 20 Subpena issued.
" 21 8 Summons Returned: I received this summons on September 18,1972, at 4:00 o'clock P.M.,and personal service of it upon William H. Dakota and Cinema I. Theatre,by serving William H. Dakota, the manager thereof., by locating them and tendering a copy of summons and accompanying documents, including the petition,motion for temporary injunction and notice of hearing on September 18,1972. Edward L. Fair. Sheriff. By Charles Harrod.Deputy. Fees --

" 21 9 Summons Returned: Sheriff's Return:I received this summons on September 18,1972, at 2:00 o'clock P.M.,and made personal service of it upon Flora Mary Collins Moor, John Doe # 1, namely, John Brownell, John Doe # 2,namely Robert Smith aka Sisson, John Doe # 3,namely, Allen R. Brown, Jane Doe #1,namely Geraldine Scott,by locating

# APPEARANCE AND EXECUTION Docket CIVIL—2

| NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION |
|---|---|---|
| The State of Ohio, ex rel. Lawrence S. Huffman | Gary R. Hermon | Injunction |
| -vs- | | |
| William H. Dakota,et al. | | |

| DATE | | 1972 | PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN |
|---|---|---|---|
| | | | them and tendering a copy of summons and accompanying documents, including the petition,motion for temporary injunction,and notice of hearing on September 18, 1972. Edward L. Fair. Sheriff. By J.E. Garlock.Deputy. |
| Sept. | 22 | 10 | Subpena issued. |
| " | 22 | 11 | Motion filed. |
| " | 25 | 12 | Return Receipt,signed, Sara Wallace filed. |
| " | 25 | 13 | Return Receipt,signed, Leland S. Collins filed. |
| " | 25 | 14 | Memorandum contra motion of Defendant, Flora May Moor to join Six Defendants filed. |
| " | 25 | 15 | Proof of service of amended complaint filed. |
| " | 25 | 16 | Proof of service of amended complaint filed. |
| " | 26 | 17 | Motion to Quash Subpoena Duces Tecum with Memorandum Attached Filed. |
| " | 26 | 18 | Motion to Dismiss filed. |
| " | 29 | | Subpena issued |
| " | 29 | | Subpena Duces Tecum issued |
| Oct. | 2 | 19 | Judgment Entry joining party defendants filed. |
| " | 3 | | Summons together with copy of complaint,motion and amended complaint mailed by certified mail;return receipt requested to the party-defendants, William C. Russell, indiv. and as guardian of Bruce L. and Corrine E. Russell,2722 233rd St.,Torrance, Calif.; Edward L. Russell,17 LaCuesta Dr.,San Rafael, Calif. ; Michael E. Russell, 17 LaCuesta Dr.,San Rafael, Calif.; Patricia L. Fitzgerald,3701 Divisadero,Apt. 107, San Francisco, Calif.; Irene C. Russell, 49H-C Calle Cadiz, Laguna Hills, Calif. Postage ($1.05$-$5.25). |
| " | 10 | 20 | Return Receipt,signed, Edward L. Russell filed. |
| " | 10 | 21 | Return Receipt,signed, Irene C. Russell filed. |
| " | 10 | 22 | Return Receipt,signed, Michael L. Russell filed. |
| " | 10 | 23 | Return Receipt,signed, William C. Russell filed. |
| " | 12 | 24 | Supplemental Memoranda filed. |
| " | 16 | 25 | Summons mailed to Patricia L. Fitzgerald,returned, refused filed. |
| " | 16 | | Summons mailed by regular mail to the Defendant, Patricia L. Fitzgerald, 3701 Divisadero, Apt. 107, San Francisco, California. Postage ($.40). |
| " | 19 | 26 | Answer filed. |
| " | 24 | 27 | Order filed. |
| " | 25 | 28 | Motion to stay judgment pending appeal filed. |
| " | 30 | 29 | Return on Inventory filed. |
| " | 30 | 30 | Approval of Return of Inventory filed. |
| " | 31 | 31 | Answer of defendatts, William C. Russell,William C. Russel as guardian of Bruce L. Russell and Corrine E. Russell,Edward L. Russell,Michael E. Russell,Patricia L. Fitzgerald,and Irene C. Russell filed. |
| Nov. | 3 | 32 | Proof of service filed. |
| " | 5 | 33 | Not on filed. |
| " | 5 | 34 | Journal Entry filed. |
| " | 5 | | Subpena issued. |
| " | 3 | 35 | Request filed. |
| " | 6 | | Certified copy of Journal Entry mailed by certified mail, return receipt requested to Leland Samuel Collins 510 River Street R. D. # 2 Madison, Ohio 44057 and Sara Lee Collins (Wallace) 1338 Monticello Boulevard, North Saint Petersburg, Florida. 33073. Postage $1.46/ |
| " | 6 | 36 | Journal Entry granting leave to file answer f led. |
| " | 6 | 37 | Answer filed. |
| " | 6 | 38 | Proof of Publication filed. The Lima News $216.72 |
| " | 6 | 39 | Motion filed. |
| " | 6 | 40 | Journal Entry on Motion filed. |
| " | 9 | 41 | Return Receipt filed. Signed from Leland Samuel Collins |
| " | 13 | 42 | Return Receipt,signed, William F. Wallace filed. |
| " | 24 | 43 | Journal Entry overruling motion filed. |
| " | 30 | 44 | Journal Entry filed. |
| Dec. | 1 | | Subpena issued. |
| " | 4 | 45 | Motion filed. |
| " | 7 | 46 | RETURN: This is to certify that the undersigned did serve a copy of the judgment entry granting the permanent injunction in case No. 72 CIV 0326 in the Court of Common Pleas of |

72 CIV 0326 (Page 3)
APPEARANCE AND EXECUTION Docket No. CIV-2

NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION

The State of Ohio, ex rel.
Lawrence S. Huffman
-vs-
William H. Dakota,et al.

| DATE | ITEM NO. | PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN |
|---|---|---|
| | | Allen County, Ohio,by personally handing to them a copy of said Judgment Entry to the below described indivuals on November 30,1972 to John Brownell,1655 Reed Rd., Lima, Ohio; Robert Smith,406 East North,Lima, Ohio; and Geraldine Scott,150 East Tenth,Lima, Ohio. Edward L. Fair. Sheriff. By Russell L. Bradford. Deputy. |
| Dec. 7 | 47 | RETURN: The undersigned does hereby certify that on November 22,1972, a certified copy of the foregoing Order was personally served upon the following persons located at the Cinema I Theatre, # 69, Public Square,Lima, Ohio Robert Hollis. Edward L. Fair. Sheriff. By Russell L. Bradford. Deputy. |
| " 7 | 48 | Return: The undersigneddoes hereby certify that on November 21,1972, a certified copy of the foregoing Order by personally serving upon the following persons located at the Cinema I Theatre, #69 Public Square,Lima, Ohio, upon Marsha Klein, 226 N. Jameson,Lima, Ohio, Richard Brownell,1655 Reed Rd.,Lima, Ohio, Robert Smith, 406 East North Street,Lima, Ohio. Edward L. Fair. Sheriff. By J. E. Garlock,Deputy. |
| " 8 | 49 | Motion filed. |
| " 8 | 50 | Subpena filed. |
| " 11 | 51 | Memorandum of law on effect of removal on state Court action filed. |
| " 11 | 52 | Notice of Removal filed. |
| " 21 | 53 | Motion for Release of Films filed. |
| 2 21 | 54 | Memorandum in Support of Motion filed. |
| 1973 May 1 | 55 | Motion filed. |
| " 1 | 56 | Journal Entry setting time of hearing filed. Jn 76-131. |
| " 3 | 57 | Petition for removal filed. |
| " 3 | 58 | Mamorandum of Law on effect of removal on State Court Action filed. |

2-23

No. 72CIV036 Jr.6 P. Rec. P. Ex. Docket CIVIL—2 Term, A.D. 19

Statement of Costs Sent

Fee Book No._____ Page _____ $_____

Johnson-Watson • Dayton Blank Book - D-2191

TITLE OF CASE

State of Ohio, ex rel. Lawrence S. Huffman
-VS-
William H. Dakota, et al.

| DATE | DEPOSITED BY | AMOUNT | C. S. NO. | PAGE |
|---|---|---|---|---|

FINDINGS, JUDGMENTS, ORDERS AND DECREES

Oct. 27, 1972. Upon consideration, defendant motion to stay judgment pending appeal is overruled. Hearing on permanent injunction assigned for November 7, 1972 at 9:00 o'clock A.M. Mr. Huffman to prepare the entry, Robert M. Light Judge.

| COSTS | PLT'F | DEF'T | RECEIPT FOR FEES |
|---|---|---|---|
| Robert H. Dunlap, Clerk Fee Fund | | | |
| Edward L. Fair, Sheriff | | | |
| Execution, Fee Fund | | | |
| Witnesses, see below | | | |
| Official Stenographer | | | |
| Transcript | | | |
| Foreign Sheriff | | | |
| " " | | | |
| " " | | | |
| Printer | | | |
| " | | | |
| " | | | |
| Justice | | | |
| " | | | |
| Constable | | | |
| " | | | |

STATE OF OHIO, Allen County, } SS CERTIFICATE OF COPY

I, ROBERT H. DUNLAP Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Docket Sheets on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio this 4th day of May, A.D. 19 73

(SEAL)

ROBERT H. DUNLAP

Ruth Montague

Z-24

| DIST. DIV. CODE | TYPE | DOCKET YR. | DOCKET NUMBER | FILING DATE MO. | DAY | YR. | TIME HR. | MIN. | DEMAND $ | OTHER | ORIGIN | DOCKET YR. | DOCKET NUMBER |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 647 3 | | 72 | 0384 | 10 | 26 | 72 | 3 | 44 | | Inj. | 4714 | 72 | 384 |

DAKOTA, William

vs.

FAIR, Edward, Sheriff
GARLOCK, Joe, Deputy Sheriff

- ATTORNEYS -

Ted Iorio
435 S. Rawley St.
Toledo, Ohio 43609

Lawrence J. Huffman
Prosecuting Attorney, Allen County
Lima, Ohio

- CAUSE -

(Docket Entries)

10/26/72 Civil cover sheet filed.
10/26/72 Complaint filed.
10/26/72 Motion for temporary restraining order filed.
10/26/72 Memo. in support of motions for temporary restraining order and preliminary injunction filed.
10/26/72 Certification of notice to Lawrence Huffman re request for temporary restraining order filed.
10/26/72 Motion for preliminary injunction filed.
10/26/72 Motion to convene a three judge panel filed.
10/26/72 Summons issued. Two copies summons and two copies of all pleadings filed to U. S. Marshal.
10/30/72 Minutes of proceedings filed. NJW. Hearing on motion for temporary restraining order: stip. of counsel re admissions and denials of parts of complaint: arguments of counsel. Matter taken under advisement.
11/2/72 Opinion and Order filed. NJW. State injunction stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing. Copy 77(d) to Iorio and Huffman.
12/4/72 2 Summons returned, executed and filed. Both Defts. served 10/27/72 by cert. mail Fees $8.00

POOR COPY

Nicholas J. Walinski

FEES PAID 71782 17 NOV 2 1972 FILED

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY _____ DATE

UNITED STATES DIST CT COURT FOR Northern District of Ohio Western Division

| 647 3 DIST/OFFICE | DOCKET Yr 72 Number 0432 | FILING DATE 12 01 72 | 3 44 1 | DEMAND $ | 4714 JUDGE NO | DOCKET Yr 72 Number 432 |
|---|---|---|---|---|---|---|

PLAINTIFFS

PURSUE, Ltd.

Ted Iorio
435 S.Hawley St.
Toledo, O. 436-9 (248-5351)

Gilbert H. Deitch,Esq.
Suite 2005, 1175 Peachtree St.,N.E.
Atlanta, Ga. 30309

Robert E. Smith
Suite 507, 102 W. Pennsylvania Ave.
Towson, Maryland 21204

DEFENDANTS

HUFFMAN, LAWRENCE S. in his capacity as Prosecutor Allen County

FAIR, EDWARD, in capacity as Sheriff Allen County, Ohio

Lawrence S. Huffman, Prosecuting Attorney
Allen County, 127-129 N. Pierce St.
Lima, O. 45802 (229-0786)

Gary A. Hess

CAUSE

12/1/72 Civil cover sheet filed.
12/1/72 Complaint for T.R.O., Preliminary and permanent injunction, etc. filed.
12/1/72 Order granting stay of judgment entry of the Allen Co. Common Pleas Court, # 72 CIV 0326 dated 11/30/72 except insofar as any order which may apply to films previously declared obscent in prior hearing filed. NJW. Two true copies to U. S. Marshal, True copy mailed with complaint to Governor John Gilligan and Hon. William Brown., Iorio,Deitch, & Smith
12/1/72 Summons issued. Two copies summons, 2 copies complaint and 2 copies order granting stay to U.S. Marshal.
12/11/72 Designation of three judges by Sixth Circuit Court of Appeals, Judge Walinski, Judge Young and Judge Celebrezze filed.
12/21/72 Order for parties to file briefs in support of their respective positions on or before 1/15/73 filed. NJW. Copy 77(d) mailed to: Smith, Deitch, Huffman and Fair.
12/21/72 Complete pleadings and papers to date prepared and given to Judge Walinski, Judge Young and Judge Celebrezze.
2/22/72 2 Summons returned, Executed & filed. Huffman served 12/5/72; Fair served 12/5/72. Fees $14.00.
12/27/72 Stip. and order that pltfs. may file amended complaint instanter and dofts. may plead or move within 14 days from date of the filing of the amended complaint. NJW. Notice waived. (Copies to Judge Walinski, Judge Young and Judge Celebrezze.)
2-29-72 Pltf. Amendments to Complaint, filed. Copy mailed 12-26-72. (Orig.,4 copie (Copies to Judges Walinski, Young & Celebrezze on 1/4/73)
1/5/73 Deft's. answer to complaint and amendments to complaint filed. Mailed 1/4/73. (Copy to Judge Walinski, Young & Celebrezze on 1/8/73)
1/16/73 Trial brief of defendant filed. Copy mailed 1/15/73. Copy to Judge Celebreeze, Judge Young and Judge Walinski.

Nicholas J. Walinski 71982 23 JAN 2 1973

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR
Northern District of Ohio
Western Division

| FILING OR ORDER DATE | |
|---|---|
| 1/18/73 | Recitation of points and authorities in support of contentions before the Court by plaintiff filed. Mailed 1/17/73. Copy mailed to: Judge Celebreezze, Young and Walinski. |
| 2/12/73 | Motions to dissolve temporary restraining order and to dismiss filed. Mailed 2/9/73. 2/20/73 - Copy to Judge Young, Walinski and Celebreeze. |
| 2/12/73 | Motion for immediate hearing on motions to dissolve T.R.O. and to Dismiss filed. Mailed 2/9/73. Copies mailed to Judge Walinski, Young and Celebreeze on 2/20/73. |
| 2/12/73 | Proposed order re: motions to dissolve T.R.O. and to Dismiss LODGED. |
| 3/5/73 | Ordered Cause set for pretrial 3/7/73 at 10:00 AM; Hearing set 3/12/73 at 10:30 AM filed. DJY. Copies 77(d) by special delivery to Deitch, Smith, Huffman, Iorio and Judge, Celebrezze |
| 3/12/73 | Supplemental Memorandum of Defts. filed. |
| 3/12/73 | Minutes of Proceedings filed. NJW. Hearing on motion to dissolve Temporary Restraining Order. Arguments of counsel; matter taken under advisement. |
| 4/20/73 | Opinion and Order filed. AJC. DJY. NJW. Defts enjoined from executing portion of Allen County Common Pleas Court's judgment of Nov. 30,1972 which orders closing of Pltfs theater pursuant to O.R.C. §3767.03; three judge court dissolved and case remanded to NJW for further proceedings under Pltf. claim for damages. Copies 77(d) to Deitch, Smith, Hiffman, Iorio and Judge Celcebrzze. |

647 3 DIST./OFFICE | DOCKET Yr. 72 Number 0445 | FILING DATE Mo. 12 Day 11 Yr. 72 | 4 44 NS | 2 O'L R | DEMAND $ Other Inj. | 4714 JUDGE NO | DOCKET Yr. 72 Number 445

PLAINTIFFS | DEFENDANTS

HUFFMAN, Lawrence S.
(State of Ohio, ex rel)

DAKOTA, William H. a/k/a Jack Desmond a/k/a William Kern
MOOR, Flora May Collins
COLLINS, Leland Samuel
Defendants cont'd.

- ATTORNEYS -

Lawrence S.Huffman
Prosecuting Attorney
Allen County
Lima, O. 45802

Ted Iorio - 435 S. Hawley St.
Toledo, O. 43609 - (241-3268)
Gilbert Deitch

- CAUSE -

(Docket Entries)

12/11/72 Civil cover sheet filed.
12/11/72 Petition for removal filed.
12/11/72 Notice of removal filed.
12/11/72 $250.00 deposited in Registry as surety for costs.
12/18/72 Motion to remand filed. Mailed 12/15/72.
12/18/72 Memo. in support of motion to remand filed. Mailed 12/15/72.
12/18/72 Motion for immediate hearing filed. Mailed 12/15/72.
2/12/73 Motion for immediate hearing on motion to remand filed. Mailed 2/9/73.
2/12/73 Proposed order re; hearing on motion for immediate hearing on remand LODGED.
3/12/73 Additional Memorandum of Pltf. in Support of Motion to Remand filed.
1/26/73 Opinion and Order filed. NJW. Cause be and hereby is dismissed. Copies 77(d) to Huffman, Iorio and Deithc.

Nicholas J. Walinski

FEE PAID 74cc6 23 JAN 2 1973 MAY 2 1973

ITED STATES DISTRICT COURT DOCKET
TIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR:
Northern District of Ohio
Western Division

647 3 DIST/OFFICE Type | DOCKET Yr 73 Number 0176 | FILING DATE Mo 05 Day 03 Yr 73 | 3 44 2 J I N/S O I R | DEMAND $ Other | 4711 JUDGE NO | DOCKET Yr 73 Number 176

PLAINTIFFS

Huffman, Lawrence S.
(State of Ohio ex rel)
U.S.

DEFENDANTS

Dakota, William H.
Moor, Flora May Collins
Collins, Leland Samuel
Collins, Sara Lee
Pussy Cat Corp. - Lima
Pussy Cat Corp. - L.A. Calf.
Cinema I. Theatre
Doe, John #1, 2, 3, 4, 5.
Doe, Jane #1, 2.
U.S.

ATTORNEYS

Lawrence S. Huffman, Esq.
Prosecuting Attorney
Allen County, Ohio
Assistant Attorney General
Room 210 71 E. State St.
Columbus, Ohio 43215

Ted Iorio, Esq.
435 South Hawley St.
Toledo, Ohio 43609
Ph.No. 248-5351

Gilbert H. Deitch, Esq
Suite 2005 100 Colony
1175 Peachtree St. N.E.
Atlanta, Georgia 3030
Ph. 892-8690 (404)

CAUSE -

Petition for removal - Civil Rights.

(Docket Entries)

| | |
|---|---|
| 5-3-73 | Civil Covdr Sheet, filed. |
| 5-3-73 | Notice of removal, filed. |
| 5-3-73 | Petition for Removal, filed. Copies served. |
| 5-3-73 | Memo. of Law on Effect of Removal on State Court Action, filed. |
| 5-3-73 | Bond in sum of $250.00 with The Travelers Indemnity Co. as surety, filed. |

Don J. Young, Judge

FEES PAID 74724

IS SUBMITTED

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY

DATE

UNITED STATES DISTRICT COURT FOR:
NORTHERN DISTRICT OF OHIO/ W.D.